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Major Litigation Activities Regarding Major Life Activities: The Failure of the Disability Definition in the Americans with Disabilities Act of 1990

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MAJOR LITIGATION ACTIVITIES REGARDING MAJOR LIFE ACTIVITIES: THE FAILURE OF THE “DISABILITY” DEFINITION IN THE AMERICANS WITH DISABILITIES ACT OF 1990

LISA EICHHORN*

The passage of the Americans with Disabilities Act (“ADA”) in 1990 has been praised as the major accomplishment of the disability rights movement. This statute, however, is not without its flaws. Perhaps the most problematic one is the way in which “disability” is defined. Lisa Eichhorn argues that the definition undercuts the effectiveness of the ADA. She begins with a historical look at society’s concepts of disability and discusses how these concepts were incorporated into the Rehabilitation Act of 1973 and the ADA. She then examines cases that have been dismissed because plaintiffs cannot prove disabled status, which illustrate the problems with the disability definition. The Supreme Court has not provided lower courts with much guidance in this area, as demonstrated by the recent case of Bragdon v. Abbott. Ms. Eichhorn, however, offers relief for courts struggling with the definition: amend the disability definition so it represents more accurately the goals not only of the Act’s drafters but also of disability rights activists.

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I. INTRODUCTION

In 1990, while signing the Americans with Disabilities Act¹ ("ADA") into law, President Bush announced that the new legislation represented "the full flowering of our democratic principles" and promised "to open up all aspects of American life to individuals with disabilities."² By prohibiting discrimination based upon disability,³ the ADA indeed showed signs of enabling millions of Americans with disabilities to participate more fully in society. By 1996, however, courts applying the language of the ADA had summarily dismissed numerous cases of alleged disability discrimination on the ground that the plaintiffs were not disabled, even though the plaintiffs bringing these cases suffered from disorders as severe as cancer⁴ and hemophilia.⁵ In June 1998 in *Bragdon v. Abbott*,⁶ a plaintiff with asymptomatic HIV won the right to have a federal court consider the merits of her claim of disability discrimination by her dentist. That victory, however, came only after the U.S. Supreme Court conducted a philosophical inquiry into the significance of reproduction to human existence in order to determine if the plaintiff was disabled for purposes of the ADA.⁷ The plaintiff in *Bragdon* was lucky. A recent survey conducted by the American Bar Association found that a significant percentage of ADA discrimination claims are dismissed on summary judgment because plaintiffs cannot prove the prima facie elements, which include disabled status.⁸ The survey also revealed that in cases in

1. 42 U.S.C. §§ 12101-12213 (1994). For a helpful overview of the ADA's provisions, see *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1604-13 (1996).

2. Statement on Signing the Americans with Disabilities Act of 1990, 2 PUB. PAPERS 1070 (July 26, 1990).

3. See 42 U.S.C. §§ 12112, 12132, 12182 (prohibiting disability-based discrimination with respect to employment, public services, and public accommodations, respectively).

4. See, e.g., *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 193 (5th Cir. 1996) (holding that a plaintiff with breast cancer did not have a disability).

5. See, e.g., *Bridges v. City of Bossier*, 92 F.3d 329, 335-36 (5th Cir. 1996) (holding that the plaintiff, who was rejected from a firefighting job because of his hemophilia, was not disabled), *cert. denied*, 117 S. Ct. 770 (1997).

6. 118 S. Ct. 2196 (1998).

7. See *id.* at 2204-05.

8. See *Study Finds Employers Win Most ADA Title I Judicial and Administrative*

which one party clearly prevailed, 92% of judicial decisions favored defendants.⁹

Although the ADA has been hailed as the chief accomplishment of a civil rights movement on behalf of people with disabilities, the way in which "disability" is defined in the statute has undercut its effectiveness as a guarantor of civil rights. This Article analyzes the harmful effect that the definition has on litigation involving disability discrimination and calls for change. Part II traces new concepts of disability that have emerged through the disability rights movement in the past several decades and discusses how these concepts became incorporated into two landmark federal statutes: the Rehabilitation Act of 1973¹⁰ and the ADA. Part III documents the ways in which the specific wording of the ADA's definition of "disability," borrowed from the earlier Rehabilitation Act, has undercut the statute's goal of fostering greater participation in society on the part of people with disabilities. The problematic language in the definition fails to reflect the congressional intent to cover people with a broad range of physical and mental impairments, and it actually cuts against several of the theoretical underpinnings of the disability rights movement. Most significantly, the statutory language has caused courts to dismiss legitimate lawsuits when plaintiffs cannot prove their disabled status under the poorly drafted definition. Although the Supreme Court recently examined the definition, its opinion in *Bragdon* provides little or no guidance for future cases because the essentially meaningless statutory language does not allow the Court to articulate firm principles of interpretation. Finally, Part IV responds to these identified weaknesses by suggesting amendments to the ADA's definition of disability that will allow the definition to reflect more accurately the principal goal of the ADA's drafters and of the disability rights movement: to prevent discrimination on the basis of disability.

Complaints, 22 Mental & Phys. Disability L. Rep. (ABA Comm'n on the Mentally Disabled) 403, 403-05 (May-June 1998) [hereinafter *Employers Win*] (compiling figures indicating that of the 760 ADA cases between 1992 and 1998 resulting in a decision for one party or the other, 232 were decided in favor of the defendant on summary judgment). In addition to disabled status, a plaintiff must also prove as a prima facie matter that he or she is qualified for the job at issue and that he or she suffered an adverse action because of the disability. See, e.g., *Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 294 (5th Cir. 1998) (per curiam) (stating the elements of ADA plaintiff's prima facie case); *Nesser v. TransWorld Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998) (same); *Barnett v. U.S. Air, Inc.*, 157 F.3d 744, 748 (9th Cir. 1998) (same); *Laurin v. Providence Hosp.*, 150 F.3d 52, 56 (1st Cir. 1998) (same).

9. See *Employers Win*, *supra* note 8, at 404.

10. 29 U.S.C.A. §§ 701-796l (West 1999).

II. COMING TOGETHER: HOW THE ADA EMERGED AS THE PRODUCT OF A DISABILITY RIGHTS MOVEMENT

The ADA states that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."¹¹ To meet these goals, the statute includes among its purposes "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"¹² and "to provide clear, strong, consistent, enforceable standards addressing [this type of] discrimination."¹³ These goals and purposes derive from a historic disability rights movement, which was largely responsible for incorporating them into our national civil rights policy.¹⁴ Therefore, any assessment of how the ADA has allowed the United States to meet these goals must begin with an understanding of the goals themselves in the context of the disability rights movement.

A. *People with Disabilities Defining Themselves*

While activists urged society to grant rights to the disabled as early as the nineteenth century,¹⁵ the most noted historian of the modern disability rights movement traces its origins to the late 1960s and early 1970s.¹⁶ The hallmark of the modern movement is the

11. 42 U.S.C. § 12101(a)(8) (1994); see also Robert L. Burgdorf, Jr., "Substantially Limited" Protection from Disability Discrimination: The Special Treatment Model and Misconstruction of the Definition of Disability, 42 VILL. L. REV. 409, 513-16 (1997) (tracing the goal of full participation to the writings of disability activist Jacobus S. tenBroek).

12. 42 U.S.C. § 12101(b)(1).

13. *Id.* § 12101(b)(2).

14. See, e.g., FRED PELKA, THE DISABILITY RIGHTS MOVEMENT (1997) (providing an encyclopedic treatment of significant events, persons, and organizations in the movement); JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT (1993) (providing a comprehensive history of the disability rights movement).

15. Dorothea Dix, for example, pushed for reform of public almshouses in which many disabled people were warehoused in the early 1800s. See SHAPIRO, *supra* note 14, at 59-60; U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 19 (1983); see also PELKA, *supra* note 14, at 106-08 (describing the career of Dorothea Dix).

16. See SHAPIRO, *supra* note 14, at 41-73. Another chronicle of the disability rights movement that emphasizes current issues facing disability activists in the United States and abroad is found in JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT (1998).

refusal of disabled people to be marginalized—that is, to be viewed as “the Other”¹⁷—in a society dominated by non-disabled people. Indeed, in the modern movement, disabled people have chosen to define themselves rather than to accept societal dictates regarding who they, as disabled people, should be. Underlying this rejection of societal labels is the recognition that disability itself is socially constructed.¹⁸ In other words, society’s categorization of some people as “disabled” and others as “non-disabled” is entirely arbitrary; it depends upon relative notions regarding the activities that human beings should be able to perform and how they should be able to perform them.¹⁹ Thus, the notion that there is something wrong or abnormal about people with disabilities is equally arbitrary.²⁰ Along these lines, one theoretician of disability issues sees his goal as helping “‘normal’ people to see the quotation marks around their assumed state.”²¹

17. See Myron G. Eisenberg, *Disability as Stigma*, in *DISABLED PEOPLE AS SECOND-CLASS CITIZENS* 3, 3 (Myron G. Eisenberg et al. eds., 1982) [hereinafter *DISABLED PEOPLE*] (analyzing the position of disabled citizens as “Others” in society and drawing on notions of “the Other” from JERZY KOSINSKI, *THE PAINTED BIRD* (1965)).

18. For excellent theoretical discussions of the relativity of disability, see LENNARD J. DAVIS, *ENFORCING NORMALCY: DISABILITY, DEAFNESS, AND THE BODY* 1-22 (1995), and CLAIRE H. LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT: LEGISLATIVE ROOTS* (1988).

19. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 15, at 90 (“Concepts of normality and abnormality and of ability and disability have no real meaning unless they are considered in the context of the nature and purpose of a particular task or activity.”); see also Robert L. Burgdorf, Jr., *Who Are “Handicapped” Persons?*, in *THE LEGAL RIGHTS OF HANDICAPPED PERSONS: CASES, MATERIALS, AND TEXT* 11, 11 (Robert L. Burgdorf, Jr. ed., 1980) (“[C]ertain traits have been singled out and called handicaps. The fine line between *handicapped* and *normal* has been arbitrarily drawn by the ‘normal’ majority.” (footnote omitted)). Consistent with this notion of relativity, Nancy Eiesland, a theorist of religion and disability, points out that “people with disabilities are distinguished not because of our shared physical, psychological, or emotional traits, but because ‘temporarily able-bodied’ persons single us out for differential treatment.” NANCY L. EIESLAND, *THE DISABLED GOD: TOWARD A LIBERATORY THEOLOGY OF DISABILITY* 24 (1994); see also SIMI LINTON, *CLAIMING DISABILITY: KNOWLEDGE AND IDENTITY* 12 (1998) (“When disability is redefined as a social/political category, people with a variety of conditions are identified as *people with disabilities* or *disabled people*, a group bound by common social and political experience.”).

20. Writer Carol Gill has noted that in an ideal world, “[b]eing unable to do something the way most people do it would not be seen as something bad that needed curing. It would be seen as just a difference.” Carol J. Gill, *Questioning Continuum*, in *THE RAGGED EDGE* 42, 45 (Barrett Shaw ed., 1994). This ideal state, or something close to it, may actually have existed not so long ago. See DAVIS, *supra* note 18, at 23-30 (tracing the valuing of “normal” or “average” status to the rise of statistical analysis in the late eighteenth century, before which time all human bodies were judged as equally short of some unattainable ideal).

21. DAVIS, *supra* note 18, at xii.

A good illustration of this aspect of disability theory is the Deaf Culture movement.²² This movement consists of people in the deaf community "who reject the idea that an inability to hear constitutes a disability, maintaining instead that they are members of an ethnic and linguistic minority"²³ who communicate primarily through American Sign Language ("ASL"). Because many deaf people have no problem communicating with each other and have in fact developed an ASL literature and theater, they see deafness as a positive cultural identity rather than a handicapping condition.²⁴ According to proponents of Deaf Culture, outsiders who see deafness simply as the lack of hearing are looking at the world through an "ableist"²⁵ or "audist"²⁶ perspective.

Similarly, scholars in the disability studies movement have noted that any classification of people into "disabled" and "non-disabled" categories must come from a prejudiced perspective because all human abilities can be placed on a continuum, thus making black-and-white categorization impossible.²⁷ Those who wish to draw

22. For more information regarding the Deaf Culture movement, see HARLAN LANE, *THE MASK OF BENEVOLENCE: DISABLING THE DEAF COMMUNITY* 13-28 (1992); PELKA, *supra* note 14, at 88-89; SHAPIRO, *supra* note 14, at 75-104. See generally DOUGLAS C. BAYNTON, *FORBIDDEN SIGNS: AMERICAN CULTURE AND THE CAMPAIGN AGAINST SIGN LANGUAGE* (1996) (exploring deafness in the context of cultural history).

23. PELKA, *supra* note 14, at 88; see also DAVIS, *supra* note 18, at xii ("[M]any in the Deaf community will argue that deafness is not a disability."). But see BONNIE POITRAS TUCKER, *THE FEEL OF SILENCE* at xxi-xxii (1995) ("I am viewed as a traitor to my heritage because I would gladly grab any opportunity to fix my deafness. Deaf people lack one of the five critical senses, plain and simple. That lack is something to be repaired, to the extent that reparation is possible.").

24. See PELKA, *supra* note 14, at 88. For an insightful chronicle of the development of a common culture among students at a school for the deaf in New York City, see LEAH HAGER COHEN, *TRAIN GO SORRY: INSIDE A DEAF WORLD* (1994).

25. See PELKA, *supra* note 14, at 3 (defining "ableism" as a "set of often contradictory stereotypes about people with disabilities that acts as a barrier to keep them from achieving their full potential as equal citizens in society"); see also LINTON, *supra* note 19, at 9 (defining "ableism" as including "the idea that a person's abilities or characteristics are determined by disability or that people with disabilities as a group are inferior to nondisabled people").

26. See DAVIS, *supra* note 18, at xiv (using the term "audist" to describe a prejudice that favors hearing people and disfavors or ignores deaf people); LANE, *supra* note 22, at 43 (defining the term "audism" as "the paternalistic, hearing-centered endeavor that professes to serve deaf people"); PELKA, *supra* note 14, at 33 (defining "audism" as "the belief that life without hearing is futile and miserable, that hearing loss is a tragedy and 'the scourge of mankind,' and that deaf people should struggle to be as much like hearing people as possible").

27. See DAVIS, *supra* note 18, at xv; see also Burgdorf, *supra* note 11, at 519-22 (discussing the spectrum of human abilities). But see Gill, *supra* note 20, at 42-43 (criticizing the notion of a continuum or spectrum because it downplays the important, valuable consequences of individual differences among people). For an excellent defense

lines—to reify disability²⁸—are simply trying to ensure their own place on the correct, “normal” side.²⁹ They can then assume that those on the other side are somehow lesser humans, whose primary need in life is a cure that will allow them to join the ranks of the normal. In the last two decades, leaders in the disability rights movement have recognized that a transition to normalcy cannot be a valid goal because normalcy—like disability—is merely a relative concept.³⁰ While society may try to enforce its notion of normalcy by urging disabled people to go to painful or damaging lengths to resemble their non-disabled counterparts,³¹ the appearance of normalcy is not nearly as important as the right to participate fully in society.

Further, in addition to rejecting the labels and categories that society historically has assigned to disabled people, members of the disability rights movement have invented and reinvented terminology to define themselves.³² As in other civil rights movements, activists

of the disability studies movement, see LINTON, *supra* note 19, at 117-31.

28. See LIACHOWITZ, *supra* note 18, at 3 (analyzing Robert A. Scott's discussion of the reification of mental retardation in ROBERT A. SCOTT, *THE MAKING OF BLIND MEN: A STUDY OF ADULT SOCIALIZATION* 14 (1969)).

29. See Eisenberg, *supra* note 17, at 5 (“The disabled . . . serve a useful function in society, making ‘normal’ persons feel healthier, brighter, more competent, and secure.”).

30. See DAVIS, *supra* note 18, at 24 (“[T]he problem is not the person with disabilities; the problem is the way that normalcy is constructed to create the ‘problem’ of the disabled person.”); see also LIACHOWITZ, *supra* note 18, at 2-3 (discussing the relativity of deviance, including physical deviation).

31. Disability activist Nancy Eiesland recounts the story of Diane DeVries, who wore upper and lower prosthetic devices during her childhood at the urging of doctors, to “normalize” her functioning. See EIESLAND, *supra* note 19, at 37. After trying 12 pairs of arms, DeVries abandoned them, finding them “‘more of a hassle than a help.’” *Id.* (quoting an interview with Diane DeVries). Indeed, because she could eat, drink, and play much better without the arms, “DeVries felt more disabled and less independent with the devices than without them.” *Id.*

Similarly, Joseph Shapiro reports that in the 1950s, society rewarded people with polio who rejected wheelchairs and built up their muscles so that they could walk like non-disabled people (albeit with braces and crutches). See SHAPIRO, *supra* note 14, at 15-16. Doctors at that time had recommended crutches over wheelchairs not because they had evidence that walking was physically more beneficial, but simply because “sociologically it was expected.” *Id.* at 16. Ironically, decades later, those who built the most muscle found that their muscles atrophied the fastest. See *id.*

Cynthia Griggins, a rehabilitation specialist, has noted societal attitudes consistent with these anecdotes: “Somehow, a quadriplegic who is working and learning to dress himself (even though it may take him half a day) is more palatable than a quadriplegic who is doing nothing. It’s bad enough that they can’t contribute to society—at least they can *look busy!*” Cynthia Griggins, *The Disabled Face a Schizophrenic Society*, in *DISABLED PEOPLE*, *supra* note 17, at 30, 37.

32. See EIESLAND, *supra* note 19, at 25 (“As linguists and anthropologists know, the act of naming someone or something grants the namer power over the named.

have sought to reclaim pejorative terms and invest them with new, positive meaning. Thus, the word "crippled" has come into vogue among some disability activists.³³ The conversion of this term from an offensive slur to a rallying cry demonstrates the growth of pride and group identity among some disabled people. However, the more acceptable term by far today is "disabled," which has replaced the word "handicapped," a term that had been used for decades to describe people with mental and physical impairments.³⁴ In addition, most members of the movement prefer "people with disabilities" to "the disabled," because the former term emphasizes the person rather than the impairment.³⁵

Along with new notions of the idea of disability has come a new sense of community among disabled people. In the last two or three decades, a culture of disability has developed in this country, marked by the appearance of Disability Pride events, as well as writings and theater by, for, and about people with disabilities.³⁶ Organizations have formed to unite people with different types of disabilities and to foster more effective advocacy.³⁷ Indeed, disability activists have come to think of themselves as members of a minority group,³⁸ and a

Historically, rather than naming ourselves, the disabled have been named by . . . people who denied our full personhood."); see also Leonard Kriegel, *The Cripple as American Male*, in *DISABLED PEOPLE*, *supra* note 17, at 52, 55 ("[W]hen the cripple looks around himself, he discovers that he is defined from the outside.").

33. See Kriegel, *supra* note 32, at 52 ("I am . . . an individual who has lived 35 of his 46 years here on earth as a cripple, a word which I prefer to either *handicapped* or *disabled*, each of which seems to me a euphemism for the realities facing us."); see also EIESLAND, *supra* note 19, at 26 (discussing the recent use of the word "cripple"); SHAPIRO, *supra* note 14, at 34 (same).

34. One commentator has noted that the term "handicap" carries with it the idea of unequal contestants in a competition, while "disability" conveys a more general sense of limitation. See DAVIS, *supra* note 18, at xiii; see also EIESLAND, *supra* note 19, at 27 (noting that "disability" denotes an inability to perform a task and that "handicap" denotes the social disadvantage resulting from the disability); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 15, at 5 (comparing the terms "handicap" and "disability").

35. See SHAPIRO, *supra* note 14, at 33.

36. For a brief description of the development of disability culture, see PELKA, *supra* note 14, at 97-98, and SHAPIRO, *supra* note 14, at 99-104. For a discussion about the importance of the development of a disability culture, see KENNY FRIES, *STARING BACK: THE DISABILITY EXPERIENCE FROM THE INSIDE OUT* 1, 9-10 (Kenny Fries ed., 1997).

37. For a brief discussion of early disability advocacy groups, see PELKA, *supra* note 14, at 81-82; and RICHARD K. SCOTCH, *FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY* 36-37 (1984).

38. See EIESLAND, *supra* note 19, at 62 ("The minority-group model holds that the physical and psychological restrictions that people with disabilities face are primarily due to prejudice and social discrimination Hence the locus of the problem of disability . . . is the system of social relations and institutions that has . . . [marginalized] . . . people with disabilities as a group."). Lennard Davis notes that "the term 'physical minorities'

rather large one at that.³⁹

Thus, from the disability rights movement, two paradoxical ideas emerge concerning disability and identity. On the one hand, disability is an unstable term; it is a relative category, artificially constructed by a society to enforce the normalcy of the majority of its members.⁴⁰ On the other hand, disability is a valid, unifying identity that reflects the real experiences and culture of a large group of people in this same society.⁴¹ This paradox no doubt accounts for much of the confusion surrounding the attempts of the ADA⁴² and its predecessor, the Rehabilitation Act of 1973,⁴³ to define "disability" for legal purposes.

B. *People with Disabilities Defining Discrimination*

The disability rights movement's exposure of disability as a socially-constructed phenomenon logically has led to a new understanding of discrimination on the basis of disability. Specifically, the disadvantaged social and economic status of many disabled people⁴⁴ has resulted not from their disabilities themselves—which are merely artificial constructs—but rather from societal discrimination against those viewed as disabled.⁴⁵ Indeed, by viewing disabled people as "others," society has constructed a world tailored to the needs of people without physical or mental impairments. Because this world ignores the needs of the rest of the population, disabled people are less able to function in it. Disability theorists realize that this construction of the world is not inevitable and that its

gives more of a political sense to physical difference than the more abstract category 'disabled.' " DAVIS, *supra* note 18, at 3; *see also* John S. Hicks, *Should Every Bus Kneel?*, in *DISABLED PEOPLE*, *supra* note 17, at 13, 26-29 (comparing people with disabilities to ethnic minorities and suggesting that both groups could preserve their identities if society adopts a model of cultural pluralism). The ADA itself notes that "individuals with disabilities are a discrete and insular minority" in the American population. 42 U.S.C. § 12101(7) (1994).

39. The ADA, in its Findings section, notes that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. § 12101(1).

40. *See supra* notes 18-31 and accompanying text.

41. *See supra* notes 36-39 and accompanying text.

42. *See* 42 U.S.C. § 12102(2) (defining "disability").

43. 29 U.S.C.A. § 705(20) (West 1999) (defining "individual with a disability" for purposes of the antidiscrimination provision in section 504 of the Rehabilitation Act).

44. For a thorough discussion of the social and economic status of disabled people in the years leading up to the passage of the ADA, *see* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 415-26 (1991).

45. *See id.* at 416.

conscious or unconscious failure to take into account the spectrum of human needs and abilities is itself discriminatory.⁴⁶ Disabled people are not inherently disabled, but are instead actively disabled by a discriminatory society.

The roots of societal discrimination run deep and play on our ugliest emotions. Modern scholars have recognized that many non-disabled people harbor fears of disabled people, stemming from ancient religious beliefs that view disability as an outward sign of evil.⁴⁷ They are reinforced by more modern cultural images equating disability with social deviance.⁴⁸ However, fear also stems from the recognition that it is always possible to suffer a misfortune and join the ranks of the disabled. Many people are terrified to realize that they do not have control over the continued integrity of their own bodies and see people with disabilities as reminders of this lack of control.⁴⁹ Some disability activists use the term "temporarily able-bodied" to refer to non-disabled people in an effort to expose these fears and to make non-disabled people realize that disabled people are not so different after all.⁵⁰

Prejudices against disabled people also stem from society's unrealistic belief in perfection. Non-disabled people generally envision a perfect world as one in which there is no suffering and in

46. See, e.g., DAVIS, *supra* note 18, at 10 ("[I]n an ableist society, the 'normal' people have constructed the world physically and cognitively to reward those with like abilities and handicap those with unlike abilities."); see also Burgdorf, *supra* note 11, at 517-18 (noting that the structuring of "services, facilities, programs and opportunities" to meet the needs of non-disabled people, while ignoring the needs of those with disabilities, constitutes discrimination).

47. See LIACHOWITZ, *supra* note 18, at 9 (noting that "[m]any explanations of society's devaluation of physically abnormal people are based on the religious connections between physical defect and moral defect"); SHAPIRO, *supra* note 14, at 30 (discussing images of disability in the Old and New Testaments); Eisenberg, *supra* note 17, at 5 (discussing biblical roots of disability discrimination). But see EIESLAND, *supra* note 19, at 98-105 (developing a Christian theology that specifically values Jesus Christ as the "disabled God").

48. Essayist Kenny Fries notes that "[i]ntroductory guides to screenwriting actually counsel fledgling authors to give their villain a limp or an amputated limb." FRIES, *supra* note 36, at 3; see also SHAPIRO, *supra* note 14, at 30-40 (discussing portrayals of disabled people in literature, film, television, and advertising).

49. This desire for control of one's own physical integrity and the integrity of others no doubt led to the eugenics movement that became popular in the United States in the 1920s. See PELKA, *supra* note 14, at 114-15; SHAPIRO, *supra* note 14, at 271-72.

50. See, e.g., EIESLAND, *supra* note 19, at 24 (referring to "temporarily able-bodied" persons who single out disabled people for differential treatment); PELKA, *supra* note 14, at 3 (criticizing the belief that people with disabilities are "morally, intellectually, and spiritually inferior to temporarily able-bodied people").

which all people live a uniform, harmonious existence.⁵¹ In such a world, disability is unacceptable; it must be cured. The possibility of cures for all ailments seemed conceivable in the first half of this century, as the pace of medical advances increased.⁵² When even these advances failed to cure all ills, however, "[d]isabled children became an affront to the country's postwar faith in 'technology and progress.'"⁵³ Disabled adults were an even greater affront—they had had the audacity to live long lives without getting better.⁵⁴ Of course, as medicine advances, there will be more disabled people, not fewer, because people with illnesses and other physical problems are more likely to receive treatment that will allow them to live longer lives.⁵⁵ Thus, society's belief that scientific progress will one day wipe out disabilities is merely a naive manifestation of the desire to enforce normalcy.

This desire for normalcy has given rise to numerous damaging stereotypes surrounding people with disabilities. Because non-disabled people find it difficult to understand how people can live full, satisfying lives despite mental and physical impairments, they often attribute an exaggerated heroism to people with disabilities.⁵⁶ Disability activists have coined the term "super cripp" to mock this perceived heroism.⁵⁷ Unfortunately, stories of "heroic" disabled people who overcome the perceived odds and succeed in society only perpetuate the idea that most people with disabilities cannot achieve such success. In addition, these stories tend to focus on the disability

51. For an intriguing discussion of the historic association of normality and perfection, see DAVIS, *supra* note 18, at 26-39.

52. See SHAPIRO, *supra* note 14, at 14-15 (discussing the increasing belief in the 1940s and 1950s that diseases such as polio eventually would be not only prevented but also cured).

53. *Id.* at 15 (quoting from Shapiro's interview with Morgan State University Professor Marilyn Phillips, who has studied images of poster children).

54. Carol Gill, a disabled essayist, has noted that people with illnesses can be considered disabled

when they have the temerity to neither get well nor die. Society has a niche for ill people. They should be on the move, traveling the arc from health to sickness and back to health. There's another niche for people with terminal illnesses. They should move from health to death. If they know their manners, they get on with it, too—no "lingering."

Gill, *supra* note 20, at 47. Kenny Fries echoes the same idea more concisely by describing society's "kill it or cure it" mentality. FRIES, *supra* note 36, at 7.

55. See SHAPIRO, *supra* note 14, at 5-6. In addition, as science furthers our understanding of all types of impairments, and particularly of mental illness, longstanding patterns of problematic behavior are likely to be reinterpreted as disabilities.

56. See Burgdorf, *supra* note 11, at 534-35 (discussing portrayals of people with disabilities as "special," "inspirational," or "courageous").

57. See PELKA, *supra* note 14, at 292.

itself, rather than physical and attitudinal barriers, as the source of the "hero's" dilemmas.⁵⁸ Therefore, they emphasize individual strength, rather than societal change, as the key to overcoming disadvantages.⁵⁹

Fear and hatred of the disabled also have led some disabled people to hide their disabilities and "pass" for able-bodied citizens.⁶⁰ Others who cannot hide their disabilities may be tempted to give in to society's demands and take on the role of a "Tiny Tim," one who ignores indignities and acts "the part of the cheerful 'handicapped' person, grateful for any crumbs."⁶¹ This Tiny Tim image is reflected in the phenomenon of poster children who are used to stimulate charitable giving by appealing to both our paternalistic inclinations and our desire to achieve cures. Several former poster children have become part of the disability rights movement and have pointed out the damaging effects of telethons and other charitable events that rely on pitiable images of disabled people.⁶² The use of such images is itself discriminatory because it reinforces the notion that disabled people must have their needs met through charity rather than through the enforcement of their own rights. In addition, the paternalism underlying such tactics "discourages us as a society from accepting disability and seeking to accommodate it permanently

58. For examples of some "overcomer" stories, see SHAPIRO, *supra* note 14, at 16-18.

59. See PELKA, *supra* note 14, at 292.

60. Franklin Delano Roosevelt is probably the best-known American who practiced "passing" by arranging never to be photographed in his wheelchair. A new consciousness regarding this practice was evident in the 1997 controversy over the issue of whether the new FDR memorial in Washington, D.C., should include a depiction of the Depression-era president in a wheelchair. See, e.g., Mary McGrory, *FDR Sits Corrected*, WASH. POST, May 1, 1997, at A2; Michael Wines, *Limitations of Statues: Monuments Are a Risky Business*, N.Y. TIMES, May 4, 1997, § 4, at 1. While the original monument did not depict a wheelchair, President Clinton promised that such a depiction would be added, and Congress quickly passed legislation approving the additional sculpture. See Linda Wheeler, *Memorial to FDR Hits No. 1: Most Popular Tourist Spot in D.C. Is Year Old Today*, WASH. POST, May 2, 1998, at D1.

61. PELKA, *supra* note 14, at 305.

62. In 1991, Mike Ervin and Cris Matthews, two former poster children, organized a group called Jerry's Orphans specifically to oppose the general tactics and philosophy of the Jerry Lewis Muscular Dystrophy Association Telethon. See Mary Johnson, *A Test of Wills: Jerry Lewis, Jerry's Orphans and the Telethon*, in THE RAGGED EDGE, *supra* note 20, at 120, 123. Many disability activists were incensed by an article Mr. Lewis published in the September 2, 1990, issue of PARADE magazine to publicize the annual event. See *id.* at 120-21. From the imagined point of view of a person with muscular dystrophy, Lewis wrote: "I know the courage it takes to get on the court with other cripples and play wheelchair basketball . . . I realize my life is half, so I must learn to do things halfway. I just have to learn to try to be good at being half a person." *Id.* at 121-22 (quoting Jerry Lewis, *What If I Had Muscular Dystrophy?*, PARADE, Sept. 2, 1990, at 4, 5).

into our social fabric.' ”⁶³

The recognition of paternalism, stereotyping, and failure to accommodate as forms of discrimination prompted a call for civil rights for people with disabilities. Activists realized the need to shift the disability paradigm from a quest for cures to a crusade for rights. As one activist recalls, “The day I threw away the holy water from Lourdes and said to Jesus, “I think they are missing the point” was the day I joined the movement.’ ”⁶⁴ Members of the disability rights movement borrowed tactics from earlier movements including sit-ins and demonstrations.⁶⁵ Among the chief goals of the movement, which continues today, are recognition of disabled people as full human beings⁶⁶ and elimination of physical and attitudinal barriers to their full participation in society.⁶⁷ Activists emphasize that these goals must be met not as a matter of charity or benevolence but as a matter of right.⁶⁸

C. *Legislation Defining Disability-Based Discrimination*

As the disability rights movement grew in the 1970s and 1980s, federal legislation aimed at expanding opportunities for people with disabilities was developing as well.⁶⁹ The climate of social change fostered the recognition of the civil rights of various groups, including

63. Johnson, *supra* note 62, at 124 (quoting disability activist Laura Hershey).

64. JANE CAMPBELL & MIKE OLIVER, *DISABILITY POLITICS* 110 (1996) (quoting from the authors' interview with activist Micheline Mason).

65. See SHAPIRO, *supra* note 14, at 66-68; Burgdorf, *supra* note 44, at 427-28.

66. See Burgdorf, *supra* note 11, at 534 (discussing the notion that “individuals with disabilities are just people, not essentially different from other people”); Kriegel, *supra* note 32, at 55 (“Our complaint against society . . . is not so much that society ignores our presence as that it ignores our reality, our sense of ourselves as human beings brave enough to capture our destinies . . .”).

67. See SCOTCH, *supra* note 37, at 34 (noting that early disability activists found that “physical impairment was becoming less handicapping than the barriers of stereotyping attitudes and architectural constraints”).

68. See, e.g., *id.* at 41-42 (discussing rights-based rhetoric in the disability movement); SHAPIRO, *supra* note 14, at 141 (noting that even after the passage of the ADA, “nondisabled Americans still had little understanding that this group now demanded rights, not pity”); Burgdorf, *supra* note 44, at 426 (noting that the effort to pass laws prohibiting disability discrimination represented “a shift from charity to civil rights”).

69. See, e.g., Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C.A. § 794 (West 1999)); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified at 20 U.S.C. §§ 1232, 1401, 1405-1420 (1994)); The Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, 89 Stat. 486 (1975) (codified as amended at 42 U.S.C. §§ 6000-6083 (1994)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

people with disabilities.⁷⁰ While prior disability-related legislation may have been based on a desire to bestow charity rather than to recognize rights,⁷¹ the Rehabilitation Act of 1973⁷² marked an explicit change in this course. For the first time, broad federal legislation expressly prohibited discrimination against people with disabilities.⁷³ The Rehabilitation Act's passage galvanized the disability rights movement, whose members drew inspiration to push for even more wide-sweeping recognition of civil rights. Eventually, in 1990, the ADA put in place some of these broader protections.⁷⁴ The circumstances surrounding the passage of each of these acts, and their reception by the disability rights community, reflect the extent to which the philosophies of the disability rights movement were penetrating American society.

1. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973, as currently codified, states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁷⁵ This single sentence, appearing at the very end of the Act, was "no more than a legislative afterthought" in a complex spending bill.⁷⁶ The rest of the bill simply allocated funds to federal vocational rehabilitation programs, which helped disabled citizens prepare to work and live independently.⁷⁷ The antidiscrimination provision was added to a draft bill by Senate staff members who worked for the Labor and

70. See SCOTCH, *supra* note 37, at 5-11 (comparing the disability rights movement to other civil rights movements of the era).

71. See, e.g., Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat. 1329, 1465 (codified as amended at 42 U.S.C.A. § 1381 (West 1998)) (establishing the Social Security Income program, which provides cash payments to disabled people of limited resources).

72. 29 U.S.C.A. §§ 701-796.

73. The Rehabilitation Act of 1973 prevents recipients of federal financial assistance from discriminating against people with disabilities on the basis of their disabilities. See *id.* § 794(a).

74. While section 504 of the Rehabilitation Act covers only entities receiving federal financial assistance, see *id.* § 794(a), the ADA additionally covers certain employers, see 42 U.S.C. § 12111(2), state and local governments, see *id.* § 12131(1)(A), and a wide variety of private entities operating public accommodations, see *id.* § 12181(7).

75. 29 U.S.C.A. § 794(a).

76. SHAPIRO, *supra* note 14, at 65.

77. See SCOTCH, *supra* note 37, at 49.

Public Welfare Committee.⁷⁸ The staffers hastily drafted the one-sentence prohibition, using Title VI of the Civil Rights Act of 1964⁷⁹ as a model.⁸⁰ In subsequent interviews, these staffers insisted that section 504 "was an initiative of liberal congressional staff and not done at the request, suggestion, or demand of outside groups."⁸¹ At the time, no general disability lobby existed; various organizations of disabled people had yet to join together in a coordinated attempt to influence legislation.⁸² One staffer has noted that the "'Labor Committee at that time was a highly liberal, activist committee, and they were in the middle of reacting, I suppose, to Richard Nixon. And there were a lot of service programs frequently in defiance of the then Administration.'" ⁸³

The legislative history of the original bill containing section 504 reveals that Congress paid little or no attention to the antidiscrimination provision: Committee reports contain no projections of related public expenditures, and even the Congressional Record contains no references to the significance of section 504.⁸⁴ The bill was vetoed twice before being signed into law on September 26, 1973.⁸⁵ Section 504 was not at issue in either veto, and the enacted version contained the same section 504 language as its two unsuccessful predecessors.⁸⁶ While section 504 was not a direct product of pressure from disability advocates, its passage was heralded by the disability community. One advocate called the provision "historic in its scope and depth, the single most important civil rights provision ever enacted on behalf of disabled citizens in this country."⁸⁷

78. See *id.* at 47-48 (tracking the history of section 504 through interviews with congressional staffers involved with its drafting and passage).

79. 42 U.S.C. §§ 2000d (1994) ("No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

80. See SCOTCH, *supra* note 37, at 52; *supra* text accompanying note 75 for the precise language of section 504.

81. See SCOTCH, *supra* note 37, at 57; see also SHAPIRO, *supra* note 14, at 64-65 ("Disabled people did not even ask for [section 504]. Nor had they lobbied for it.").

82. See SCOTCH, *supra* note 37, at 80.

83. *Id.* at 48 (quoting an interview with former Senate staffer Robert Humphreys).

84. See generally 1973 U.S.C.C.A.N. 2076, 2076-154 (collecting committee reports and relevant Congressional Record excerpts). According to one commentator, "most members of Congress either were unaware that Section 504 was included in the act or saw the section as little more than a platitude." SCOTCH, *supra* note 37, at 54.

85. See S. REP. NO. 93-318, at 4 (1973), *reprinted in* 1973 U.S.C.C.A.N. at 2077-78.

86. See SCOTCH, *supra* note 37, at 54-55.

87. FRANK BOWE, *HANDICAPPING AMERICA* 205 (1978). The Rehabilitation Act's passage would spur the developing disability rights movement to advocate for regulations

2. The Americans with Disabilities Act of 1990

While the passage of section 504 of the Rehabilitation Act was a significant step toward recognizing the rights of people with disabilities, by 1984 advocates were calling for even broader protections.⁸⁸ Because section 504 covers only recipients of federal financial assistance, it does not prohibit discrimination by private employers or establishments. The ADA rectified this situation by specifically prohibiting discrimination in the contexts of employment,⁸⁹ public services,⁹⁰ and public accommodations operated by private entities.⁹¹

The ADA has been called a "second-generation" civil rights statute⁹² because although its general prohibitions echo the language of section 504,⁹³ its provisions proceed to map out relative rights and obligations with much greater specificity. For example, the ADA defines in detail the discriminatory conduct it proscribes.⁹⁴ In the employment context, it specifically prohibits "limiting, segregating, or classifying" an individual adversely because of a disability,⁹⁵ using criteria or tests that have a discriminatory effect,⁹⁶ and failing to provide reasonable accommodations that allow disabled employees to participate fully in the workplace.⁹⁷ This recognition of the duty to accommodate at the statutory level reinforces a key notion of disability theory: The present configuration of the world is discriminatorily skewed to accommodate people with certain physical

to effectuate the Act's policies. See SCOTCH, *supra* note 37, at 82-120.

88. See Robert L. Burgdorf, Jr. & Christopher G. Bell, *Eliminating Discrimination Against Physically and Mentally Handicapped Persons: A Statutory Blueprint*, 8 Mental & Phys. Disability L. Rep. (ABA Comm'n on the Mentally Disabled) 64, 71 (Jan.-Feb. 1984) (urging Congress to use its interstate commerce authority to pass legislation broadening the scope of the prohibition on disability discrimination).

89. Title I of the ADA covers employers with 15 or more employees. See 42 U.S.C. § 12111(5)(A) (1994).

90. Title II of the ADA covers state and local governments. See *id.* § 12131(1).

91. Title III of the ADA covers public accommodations, including restaurants, laundromats, grocery stores, private schools, day care centers, and many other establishments. See *id.* § 12181(7).

92. Burgdorf, *supra* note 44, at 415.

93. Both the ADA and section 504 prohibit discrimination against "qualified individual[s] with a disability." 29 U.S.C.A. § 794(a) (West 1999) (Section 504 of the Rehabilitation Act); 42 U.S.C. § 12112(a) (Title I of the ADA); *id.* § 12132 (Title II of the ADA).

94. For an overview of the specific nondiscrimination requirements of the ADA, see Burgdorf, *supra* note 44, at 453-91.

95. 42 U.S.C. § 12112(b)(1).

96. See *id.* § 12112(b)(3), (6)-(7).

97. See *id.* § 12112(b)(5). Title III of the ADA contains similarly specific prohibitions applicable to public accommodations. See *id.* § 12182(b)(2)(A)(i)-(v).

and mental abilities; in order to eliminate this discrimination, it is necessary to reconfigure the world so that others may participate in it.⁹⁸

The ADA also spells out relative degrees of obligation that are applicable in different contexts. Depending on the circumstances, the ADA may obligate an entity to make accommodations if they are "readily achievable"⁹⁹ or do not create an "undue hardship"¹⁰⁰ or simply "to the maximum extent feasible."¹⁰¹ These statutory standards create express balancing tests for weighing the right to access against the burdens of accommodation. The specificity with which the ADA defines discrimination "reflects congressional dissatisfaction with administrative and judicial interpretations" of earlier, broader federal disability rights provisions.¹⁰² By defining disability discrimination in detail in the statute, the ADA's drafters would not have to rely so heavily on unpredictable judicial and regulatory interpretations to carry out the Act's purposes.

While they did not participate to a great extent in the passage of section 504, disability rights advocates did lobby for and shape the enactment of the ADA.¹⁰³ One commentator noted that thanks to American society's increasing awareness of disability discrimination, the ADA took a "rocket course toward passage."¹⁰⁴ The ADA was

98. See *supra* note 46 and accompanying text. For a discussion of the difference between reasonable accommodation and discriminatory preferences, see Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 40 (1996).

99. 42 U.S.C. § 12182(b)(2)(A)(iv) (requiring public accommodations to remove architectural and structural barriers "where such removal is readily achievable").

100. *Id.* § 12112(b)(5)(A) (requiring covered employers to make reasonable accommodations for their disabled employees unless the accommodations would "impose an undue hardship on the operation of the business of such covered entity").

101. See *id.* § 12142(c)(1) (prohibiting public entities from using remanufactured public transportation vehicles unless those vehicles are accessible "to the maximum extent feasible" to people in wheelchairs); *id.* § 12183(a)(2) (1994) (requiring public accommodations to alter their facilities to allow ready access on the part of people with disabilities "to the maximum extent feasible").

102. Burgdorf, *supra* note 44, at 510.

103. See PELKA, *supra* note 14, at 18-22 (summarizing key events leading to the passage of the ADA and noting that its enactment "was the culmination of work by thousands of committed individuals").

104. SHAPIRO, *supra* note 14, at 75. Joseph Shapiro notes that the highly visible protest by deaf students seeking a deaf president at Gallaudet University in 1988 probably played a role in stirring public sentiment in favor of the ADA bill, which was introduced two months after the protest ended. See *id.* While the original bill died as a result of congressional inaction, see Burgdorf, *supra* note 44, at 433, a revised ADA bill was introduced in May 1989, see S. 933, 101st Cong. (1989); H.R. 2273, 101st Cong. (1989). By mid-July, the revised bill had passed both the House and Senate by overwhelming margins. See 136 CONG. REC. 17376 (1990) (recording the Senate vote of 91 yeas to 6

signed into law on July 26, 1990, and has been hailed as "the greatest single achievement of the disability rights movement to date."¹⁰⁵ Disability rights activists uniformly praised the passage of the ADA as a signal accomplishment that would create new opportunities for people with disabilities to participate in society.¹⁰⁶

III. COMING APART AT THE SEAMS: HOW THE ADA'S LANGUAGE HAS UNDERMINED THE GOALS OF THE DISABILITY RIGHTS MOVEMENT

As explained previously, the much-lauded ADA stemmed from a civil rights movement whose goal was to redefine disability discrimination and society's notions of people with disabilities. The way in which the ADA itself defines "disability," however, has prevented it from fulfilling its purpose of allowing people with disabilities full participation in society. Although the ADA clearly prohibits discrimination on the basis of disability, its compromising, unworkable definition of that term too often has prevented legitimate lawsuits from going forward. Numerous judicial decisions have merely illustrated the definition's many inherent problems, rather than shedding light on the definition. Even a recent U.S. Supreme Court opinion offers scant guidance as to how the ADA's specific definitional provisions can operate to fulfill the statute's purpose of eliminating discrimination and fostering integration.¹⁰⁷

A. *An Overview of the ADA's Non-Discrimination Provisions*

1. The Establishment of a Protected Class

The ADA states specifically that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual" in regard to matters of

nays); 136 CONG. REC. 17296 (1990) (recording the House vote of 377 yeas to 28 nays).

105. PELKA, *supra* note 14, at 18. President George Bush, who signed the bill into law, later noted that "[w]ith the ADA, our country took a dramatic step toward eliminating the physical barriers that existed and the social barriers that were accepted." George Bush, *Introductory Note from the Office of Former President George Bush*, in A LOOK BACK: THE BIRTH OF THE AMERICANS WITH DISABILITIES ACT 1, 1 (Robert C. Anderson ed., 1996) [hereinafter A LOOK BACK].

106. *See, e.g.*, EIESLAND, *supra* note 19, at 19 (calling the ADA an "emancipation proclamation" for people with disabilities); SHAPIRO, *supra* note 14, at 140-41 (calling the ADA's passage "an earthshaking event for disabled people" and claiming that the ADA "signaled a radical transformation in the way they saw themselves—as a minority that now had rights to challenge its exclusion").

107. *See Bragdon v. Abbott*, 118 S. Ct. 2196 (1998).

employment.¹⁰⁸ With respect to public services, the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination."¹⁰⁹ Unlike federal statutes prohibiting other types of discrimination,¹¹⁰ the ADA, in these two provisions, establishes a protected class.¹¹¹ Specifically, a plaintiff must first prove that she is a "qualified individual with a disability" before the plaintiff will have a chance to prove that the defendant engaged in discriminatory conduct. This protected class element is explicit in Titles I and II, which cover private employers and state and local governments, respectively.¹¹² Even under the public accommodations provisions of Title III, where the statute is not phrased in terms of a "qualified individual with a disability," plaintiffs must first prove their disabled status in order to pursue a discrimination suit.¹¹³ Thus, the plaintiff in an ADA suit has an extra hurdle to overcome. While a woman bringing a sex discrimination suit under Title VII of the Civil Rights Act of 1964 or a black person bringing a race discrimination suit under the same statute need not prove their sex or race,¹¹⁴ the ADA plaintiff is forced to prove his disability status in

108. 42 U.S.C. § 12112(a) (1994).

109. *Id.* § 12132.

110. *See, e.g.*, 42 U.S.C. § 2000e (1994) (prohibiting discrimination simply on the basis of race, sex, and religion, among other grounds). Courts have held that people of any race, sex, or religious belief can invoke Title VII's protections. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278-87 (1976) (holding that the race discrimination clause of Title VII prohibits discrimination against white people as well as black people); Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144-45 (5th Cir. 1975) (holding that the religious discrimination clause of Title VII prohibits discrimination against members of specific religions as well as atheists); Sibley Mem'l Hosp. v. Wilson, 488 F.2d 1338, 1340-41 (D.C. Cir. 1973) (holding that the sex discrimination clause of Title VII prohibits discrimination against men as well as women).

111. *See* Burgdorf, *supra* note 11, at 423-27 (criticizing the "protected-class" structure of section 504 of the Rehabilitation Act, which the ADA adopted); Burgdorf, *supra* note 44, at 441-44 (criticizing the "protected-class" structure of the ADA's protections).

112. *See* 42 U.S.C. § 12112(a) (Title I); *id.* § 12132(a) (Title II).

113. The Title III prohibition states simply that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation." 42 U.S.C. § 12182(a). Nevertheless, even under Title III, a plaintiff has the burden of proving that she has a "disability." *See, e.g.*, Abbott v. Bragdon, 107 F.3d 934, 938 (1st Cir. 1997) (noting that a Title III ADA case by a patient against a dentist "must start with an investigation into the patient's status"), *vacated*, 118 S. Ct. 2196 (1998).

114. *See supra* note 110. If such requirements existed, proving race or sex in some cases could be harder than one would first imagine. *See, e.g.*, Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1242-44 (1997) (rejecting essentialist concepts of racial identity); Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification*

accordance with the statutory definition before a court can even consider whether the defendant engaged in prohibited conduct.¹¹⁵

The "protected class" structure of the ADA echoes a similar provision in section 504 of the Rehabilitation Act of 1973.¹¹⁶ While no legislative history explains why section 504 was drafted to protect only a "qualified handicapped individual"¹¹⁷ (later changed to "an otherwise qualified individual with a disability"),¹¹⁸ one scholar has speculated that the drafters¹¹⁹ of section 504 hastily included this language to clarify that the prohibition on disability discrimination would not require employers to hire unqualified people.¹²⁰ The creation of a protected class was not necessary to accomplish this purpose, however. Title VII, for example, allows employers to use criteria that are "job related" and "consistent with business necessity" without speaking in terms of protected classes.¹²¹ The ADA itself explicitly allows employers to use criteria that "tend to

of *Mixed-Race People*, 84 CAL. L. REV. 1233, 1239-42 (1997) (analyzing the social construction of race); John A. Powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481, 1481 (1997) (noting that we "are all androgynous" because each of us "contains the other—male in female, female in male"); Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305, 324 (1990) (criticizing the dualism with which society views racial identity); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 281 (1995) (noting various models for the determination of gender identity).

115. See, e.g., *Reeves v. Johnson Controls World Servs., Inc.*, 140 F.3d 144, 149 (2d Cir. 1998); *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 633 (6th Cir. 1998); *Olson v. Dubuque Community Sch. Dist.*, 137 F.3d 609, 611 (8th Cir. 1998); *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 51 (5th Cir. 1997); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997).

116. See 29 U.S.C.A. § 794(a) (West 1999) (stating that "no otherwise qualified individual with a disability" shall be subject to discrimination because of the disability).

117. See Burgdorf, *supra* note 11, at 427.

118. Congress substituted the new wording in 1992. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102, 106 Stat. 4346, 4360 (codified as amended at 29 U.S.C.A. § 794(a)).

119. For a detailed account of the drafting of section 504 by congressional staffers, see SCOTCH, *supra* note 37, at 51-52.

120. See Burgdorf, *supra* note 11, at 428. The Department of Health, Education, and Welfare ("HEW"), which issued regulations and interpretive guidelines regarding section 504, sought to reassure recipients of federal funds that the words "otherwise qualified" were not meant to be read literally. The Department of Justice ("DOJ"), to which section 504 enforcement authority was transferred in 1980, adopted verbatim the HEW guidance on this point: "Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be 'otherwise qualified' for the job of driving. Clearly, such a result was not intended by Congress." 45 C.F.R. pt. 84 app. A (1998) (discussing the definition of "qualified handicapped individual").

121. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994) (setting forth the burden of proof in disparate impact cases).

screen out . . . an individual with a disability," provided that the criteria are "job-related and consistent with business necessity."¹²² The restriction of the ADA's protections to "qualified individuals with disabilities" is therefore entirely unnecessary. Moreover, even if the term "qualified" were needed to clarify that employers and public entities could establish bona fide eligibility criteria, there is still no apparent need for the word "handicapped" or "disabled" to appear in the same phrase.

Another possible rationale behind the protected class structure is the fear that people who are not "truly disabled" will somehow take advantage of antidiscrimination laws.¹²³ As disability scholars have noted, society is willing to protect those it considers disabled, but only so long as they conform to societal stereotypes.¹²⁴ This prejudice undoubtedly accounts for the ADA regulations that require a disability to be severe and long-lasting.¹²⁵ In addition, the establishment of a defined, protected class is consistent with society's tendency to draw lines between "disabled" people and "non-disabled" people, even if those lines are arbitrary in the end.¹²⁶ The protected class formulation also coincides with society's tendency to see disability as a personal trait rather than a societal construct.¹²⁷ In sum, because the ADA requires plaintiffs to prove their membership

122. *Id.* § 12113(a) (1994).

123. Courts have read this rationale into the Rehabilitation Act's disability definition, whether or not it was originally there. *See, e.g.,* Daley v. Koch, 892 F.2d 212, 215 (2d Cir. 1989) (noting that the Rehabilitation Act was not intended to cover "commonplace" personality disorders); Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986) ("The Rehabilitation Act assures that truly disabled, but genuinely capable, individuals will not face discrimination It would debase this high purpose if the statutory protections available to those truly handicapped could be claimed by anyone whose disability was minor . . .").

124. *See supra* notes 56-63 and accompanying text.

125. *See infra* notes 152-53 and accompanying text (discussing 29 C.F.R. § 1630.2(j)(2)(i), (ii) (1998)).

126. *See supra* notes 18-21 and accompanying text. This line-drawing comports with what Martha Minow has called the "abnormal-persons" approach to dealing with differences between people. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 105-07 (1990); *see also* Ruth Colker, *Bi: Race, Sexual Orientation, Gender, and Disability*, 56 OHIO ST. L.J. 1, 60-64 (1995) (criticizing the ADA's bipolar categorization of people based upon the presence or absence of "disability"); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1026-29 (1998) (discussing Martha Minow's work). Bipolar categorization of this type is at odds with Minow's "social relations" approach to difference, *see* MINOW, *supra*, at 215-16, which seems to underlie the statutory requirement of reasonable accommodation, *see supra* notes 97-101 and accompanying text.

127. *See supra* notes 58-59 and accompanying text.

in a class of people with disabilities, the statute focuses on the plaintiff's status rather than on the defendant's allegedly discriminatory conduct. Such a focus is wrong-headed; the purpose of the ADA is not to categorize individuals but rather to fight disability-based discrimination.¹²⁸

2. The Individual Elements of the "Disability" Definition

Because ADA plaintiffs must prove their "disabled" status in order to maintain a discrimination suit, the way in which the statute defines "disability" can make or break a given claim. Titles I, II, and III of the ADA each incorporate the following definition of "disability":

The term "disability" means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.¹²⁹

Drafters of the ADA lifted this definition from the Rehabilitation Act, to which it had been added by amendment in 1974.¹³⁰ They found the previous definition in the Rehabilitation Act to be unworkable for purposes of the antidiscrimination provision in section 504.¹³¹ Legislative history regarding section 504 reveals that the later three-pronged definition was designed to address different types of disability discrimination.¹³² The first prong was meant to address direct discrimination based on actual disability and to provide a definition to facilitate the statute's disability-based affirmative action requirements.¹³³ The remaining two prongs were designed to address discrimination stemming from classification of and perceptions regarding disabilities.¹³⁴ All three prongs

128. See 42 U.S.C. § 12101(b) (1994).

129. *Id.* § 12102(2).

130. See Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1617, 1619 (codified as amended at 29 U.S.C.A. § 705(9)(B) (West 1999)).

131. See S. REP. NO. 93-1297, at 37 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6388 (noting that the previous definition focused on employability and the potential to benefit from rehabilitation services and did not take account of discrimination issues).

132. See *id.* at 38, *reprinted in* 1974 U.S.C.C.A.N. at 6389-90.

133. See *id.* at 39, *reprinted in* 1974 U.S.C.C.A.N. at 6390 (stating that the affirmative action obligations of 29 U.S.C. § 791(b) (Supp. V 1975) (current version at 29 U.S.C.A. § 791(b)), can be fulfilled only by the hiring and advancement of persons with actual disabilities, rather than "persons marginally or previously handicapped or persons 'regarded as' handicapped").

134. See *id.* at 38-39, *reprinted in* 1974 U.S.C.C.A.N. at 6389-90.

incorporate the elements of "major life activities" and "substantial limitations,"¹³⁵ and both of these elements are problematic, as are other aspects of the definition.

a. Major Life Activities

The legislative history does not reveal why actual disabilities are defined in terms of limitations on "major life activities." This bit of bureaucratic language not only is vague but also runs counter to the notions of the disability rights movement and fails to capture the overall intent of the drafters.¹³⁶ If the disability label has historically depended upon arbitrary notions of the activities that people should be able to perform and the ways in which they should perform them,¹³⁷ then the categorization of some activities as "major" takes this arbitrariness one step further. An adherent of the Deaf Culture movement,¹³⁸ for example, would probably not classify "hearing" as a particularly important activity, even though most Americans, the Department of Justice ("DOJ"), and the Equal Employment Opportunity Commission ("EEOC") would classify it as "major."¹³⁹ Other activities present difficult situations even for more mainstream thinkers: lifting,¹⁴⁰ caring for others,¹⁴¹ and having children.¹⁴²

135. The first prong explicitly requires an "impairment that substantially limits . . . [a] major life activ[ity]." 42 U.S.C. § 12102(2) (1994). The second and third prongs both refer back to "such an impairment." *Id.*

136. The use of the word "major" in the disability definition tends to have a narrowing effect, despite the legislative history indicating that "major life activities" may include a broad array of general activities. See H.R. REP. NO. 101-485, pt. 3, at 30 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 452 (enjoying goods and services); *id.* pt. 2, at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (participating in community activities); *id.* pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. at 335 (eating in a restaurant).

137. See *supra* notes 19-20 and accompanying text.

138. See *supra* notes 22-26 and accompanying text.

139. See 28 C.F.R. § 35.104 (1998) (providing the DOJ definition of major life activities for Title II of the ADA to include "hearing," among other functions); *id.* § 36.104 (providing the same definition for the DOJ regulation implementing Title III of the ADA); 29 C.F.R. § 1630.2(i) (1998) (providing the same definition for the EEOC regulation implementing Title I of the ADA).

140. Compare *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1120 (5th Cir. 1998) (refusing to recognize heavy lifting as a major life activity), with *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (recognizing lifting as a major life activity).

141. See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996) (stating that caring for others is not a major life activity). Interacting with others, however, may be a major life activity. See *Krocka v. Bransfield*, 969 F. Supp. 1073, 1084-85 (N.D. Ill. 1997) (finding factual issues existed as to plaintiff's limitations in the activities of interacting with others and working).

142. See, e.g., *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998) (stating that reproduction is a major life activity). Before *Bragdon*, courts had split over the issue. Compare *Krauel*, 95 F.3d at 677 (stating that reproduction is not a major life activity), and

Regulations promulgated by the EEOC and the Department of Justice regarding this issue fail to explain *why* particular activities are considered "major," or what kind of importance to the human experience the word "major" was meant to convey. The regulations simply define major life activities as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹⁴³

It is hard to identify the common thread that links the items on this list. One item, breathing, is a physiological function that is necessary to all life. Other items, seeing and hearing, are sensory functions that are not quite so crucial to human existence. Still others, walking, speaking, and performing manual tasks, are physical acts of a more abstract nature, while the final three, learning, working, and caring for oneself, are quite abstract, not universally performed, and not necessarily predominantly physical. The variation in this list makes it difficult to take up the regulatory invitation to identify other activities "such as" these.¹⁴⁴

Furthermore, the inquiry into which "life activities" are "major" begs an inquiry into which activities make us human and give us value.¹⁴⁵ Presumably, one who cannot perform a "major life activity" does not have much of a life. Yet the entire disability rights

Runnebaum v. NationsBank of Md., N.A., 123 F.3d 156, 170 (4th Cir. 1997) (en banc) ("We agree that procreation is a fundamental human activity, but are not certain that it is one of the major life activities contemplated by the ADA."), with *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir. 1997) (recognizing reproduction as a major life activity), *vacated*, 118 S. Ct. 2196 (1998), *Hernandez v. Prudential Ins. Co.*, 977 F. Supp. 1160, 1164 (M.D. Fla. 1997) (same), and *Pacourek v. Inland Steel Co.*, 916 F. Supp. 797, 804 (N.D. Ill. 1996) (same).

143. 28 C.F.R. §§ 35.104, 36.104 (1998); 29 C.F.R. § 1630.2(i) (1998).

144. See 28 C.F.R. §§ 35.104, 36.104; 29 C.F.R. § 1630.2(i).

145. The quest to determine which activities are "major" is not unlike the inquiry undertaken by eighteenth century philosophers as to which actions make us human. See DAVIS, *supra* note 18, at 55 (noting that scientists of that era studied deaf people for insight into the nature of human beings); HARLAN LANE, *THE WILD BOY OF AVEYRON* 19-24 (1976) (describing how a mute boy, found in the French woods in 1797, reopened the philosophical question of whether speech was a necessary criterion that separated humans from animals).

Liachowitz notes that society has valued human beings in terms of their productivity and that this value system has become entrenched in American disability legislation. See LIACHOWITZ, *supra* note 18, at 9. Similarly, Cynthia Griggins states:

An entire rehabilitation system is built on this premise—that a human being is the sum of a number of functions. By definition, a fully rehabilitated individual is that person who can perform each and every function of which he is physically capable. . . . How on earth did we get to this definition of a human being? What makes "functions" so important? And how does this affect our attitudes toward the disabled?

Griggins, *supra* note 31, at 37.

movement has tried to counsel society to rethink entrenched notions of which abilities are necessary to a valuable life and to think of people not in terms of what they can or cannot do but rather in terms of who they are.¹⁴⁶ Defining people with disabilities as a function of their capacity to participate in or perform "major life activities" denigrates the value of their lives.¹⁴⁷

b. Substantial Limitations

Even if one could determine which "life activities" are "major," the ADA requires an additional inquiry to determine whether an impairment "substantially limits" a person in performing these activities. This language indicates a desire to restrict the ADA's coverage to the "truly disabled," that is, those upon whom society feels good about exercising its charitable impulses.¹⁴⁸ People whose impairments are less severe—those who lack Tiny Tim's need for a crutch¹⁴⁹—are viewed with suspicion, even when they have suffered discrimination because of an impairment.¹⁵⁰

Evidence exists, however, that Congress intended the ADA's disability definition to cover people who were not necessarily limited in their activities. People with serious diseases controlled by medication, for example, certainly were meant to be covered.¹⁵¹ Nevertheless, the text of the ADA's definition, phrased in terms of "substantial limitation," conveys the opposite meaning. Moreover, by excluding temporary¹⁵² and less than severe¹⁵³ impairments from

146. See *supra* notes 17-35 and accompanying text.

147. See LIACHOWITZ, *supra* note 18, at 10-11 (discussing the devaluation of the lives of individuals with disabilities).

148. See *supra* notes 56-63 and accompanying text.

149. See *supra* text accompanying note 61.

150. For example, Colker discusses charges of " 'abuse' of the disability rights law by individuals who are not 'really' disabled, such as individuals with attention deficit disorder." Colker, *supra* note 126, at 53. Additionally, the statute excludes people with certain types of severe impairments from its purview. See, e.g., 42 U.S.C. § 12211 (1994) (excepting, *inter alia*, kleptomania, pyromania, transvestism, certain gender identity disorders, and other listed impairments from the definition of "disability" in § 12102). Apparently, whether or not it believes disability discrimination is wrong as a matter of principle, society has identified some people with disabilities whom it deems unworthy of protection.

151. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334.

152. Regulations indicate that "duration" of the impairment is relevant to whether it is "substantially limiting." 29 C.F.R. § 1630.2(j)(2)(ii) (1998).

153. Regulations also indicate that the "nature and severity" of the impairment are relevant to whether it "substantially limits" major life activities. *Id.* § 1630.2(j)(2)(i). However, many "conditions traditionally considered to be 'disabilities' [such as diseases in remission or facial disfigurements] may not have a substantial impact on performance of

coverage, the ADA throws into question the nature of the harm it seeks to prevent. If an employer or an owner of a public accommodation has put a qualified person at a disadvantage because of the individual's mental or physical impairment, why should the severity or duration of the impairment matter? Because the harm lies in the actor's irrational reliance on a mental or physical impairment, which presumably stems from misconceptions and prejudices about people with impairments, the potential for such misconceptions and prejudices does not depend upon the duration or severity of the impairment. Furthermore, the harm to the individual is the same, no matter what the particular qualities of her impairment. The employee discharged because of his rheumatoid arthritis is in the same position as the person who was fired because of her rheumatoid arthritis that happens to be in remission: Both have lost jobs.¹⁵⁴

If the ADA recognizes the claim of one person with rheumatoid arthritis but not the other, it seems to indicate that the nature of the right being protected depends upon the nature of the impairment. However, it seems contrary to logic to assert that one person has a right to be free from prejudicial decisions based on his impairment while another does not. If the right is couched as the right to participate fully in society,¹⁵⁵ it is similarly difficult to understand why the ADA would protect this interest on behalf of someone whose impairment substantially limits her but not on behalf of someone with a less limiting impairment.

Further, the "substantial limitation" element, like the "major life activity" element, is based upon relative notions of how people should perform certain functions.¹⁵⁶ Regulations interpreting the "substantial limitation" element betray this relativity. Phrased in terms of the "average person in the general population,"¹⁵⁷ the

major life activities." Burgdorf, *supra* note 44, at 448.

154. The definition's inclusion of people with a record of disability and those who have been regarded as having a disability will not necessarily save the plaintiff whose disease is in remission. See *infra* notes 353-55, 367-74 and accompanying text.

155. See 42 U.S.C. § 12101(a)(8) (listing "full participation" by people with disabilities as one of the nation's goals). This goal appears to be based on a moral imperative that society allow all people the opportunity to flourish and not merely to exist. See Helen R. Betenbaugh, *ADA and the Religious Community: The Moral Case, in A LOOK BACK*, *supra* note 105, at 47, 65-66 (discussing the moral notion of "flourishing").

156. People will always differ as to what they consider limitations. Nancy Eiesland describes a woman who considers herself able to "walk" without assistive devices, even though she has no legs. See EIESLAND, *supra* note 19, at 37.

157. See 29 C.F.R. § 1630.2(j)(1) (defining "substantially limits" as "(i) Unable to perform a major life activity that the average person in the general population can

regulations imply that people with disabilities not only fall outside of the "general" population, but also that everyone can agree exactly as to how the "average" human in this population should perform.

c. The "Record Of" and "Regarded As" Prongs

The second and third prongs of the disability definition indicate that disability can be socially constructed. People may be "disabled" under these prongs based upon society's previous observations and perceptions of them.¹⁵⁸ However, because the second and third prongs of the disability definition incorporate the elements of "major life activities" and "substantial limitations," they raise the same contradictions and questions as the first prong.¹⁵⁹ The "record of" prong, for example, states that a disability can consist of "a record of such an impairment."¹⁶⁰ "Such an impairment" refers to the first prong's mention of an impairment that substantially limits one or more major life activities.¹⁶¹ Thus, all of the difficulties regarding these elements resurface in the second prong of the definition. Similarly, the "regarded as" prong language refers back to "being regarded as having such an impairment" and thus raises identical problems.¹⁶² Regulations expanding upon the "regarded as" prong indicate that one can qualify as "disabled" if one has "a physical or mental impairment that substantially limits major life activities only

perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to . . . the average person in the general population").

158. These prongs do not escape the problems inherent in the ADA's protected class structure, however. Legislative history indicates that these prongs, as they originally appeared in the Rehabilitation Act, covered "persons who are discriminated against on the basis of handicap, whether or not they are in fact handicapped, just as . . . the Civil Rights Act of 1964 prohibits discrimination on the ground of race, whether or not the person discriminated against is in fact a member of a racial minority." S. REP. NO. 93-1297, at 39 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6389-90. However, this assertion is not accurate. The three-pronged disability definition still divides the world into those who are (or have a record of, or have been regarded as) disabled, and those who are not. By contrast, Title VI of the Civil Rights Act does not divide the world into those who are (or have a record of being, or have been regarded as being) members of a particular race and those who are not. This difference stems from the fact that everyone has a race, but not everyone, according to societal constructions, has a disability. Thus, plaintiffs in disability discrimination suits have a unique burden of proving their own status as individuals with disabilities. The fact that they can satisfy the burden with evidence of medical records or societal perceptions does not mean that this unique burden does not exist.

159. *See supra* notes 135-57 and accompanying text.

160. 42 U.S.C. § 12102(2).

161. *See id.*

162. *See id.*

as a result of the attitudes of others toward such impairment."¹⁶³ This interpretation does not coincide with the literal language of the statute, which requires that one be regarded as having an impairment that, in itself, substantially limits a major life activity.¹⁶⁴ Nevertheless, the regulation seems consistent with congressional intent.¹⁶⁵ This consistency,¹⁶⁶ taken in tandem with the presumption that Congress validated existing regulatory interpretations of the Rehabilitation Act's identical "disability" definition when it passed the ADA,¹⁶⁷ strongly supports the construction of the third prong to include limitations caused by societal attitudes. Even so the convoluted statutory language does little to inform potential litigants that this avenue of coverage is available.¹⁶⁸

163. 28 C.F.R. §§ 35.104, 36.104 (1998); 29 C.F.R. § 1630.2(l)(2) (1998).

164. See 42 U.S.C. § 12102(2).

165. See H.R. REP. NO. 101-485, pt. 2, at 53 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 335 (noting that the "regarded as" prong includes those whose limitations stem only from the attitudes of others toward an actual or perceived impairment).

166. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Even *Chevron*, however, leaves open the question of whether a regulation is valid if it coincides with congressional intent in a situation in which the literal language of a poorly drafted statute contradicts this intent.

167. The ADA specifically directs the Attorney General to promulgate regulations to implement its provisions and requires that such regulations "be consistent" with existing regulations under section 504 of the Rehabilitation Act, which includes the regulation regarding societal attitudes. See 42 U.S.C. § 12134(a)-(b). A strong argument exists therefore that Congress retroactively validated the existing section 504 regulations when it passed this particular provision of the ADA. See William G. Buss, *Human Immunodeficiency Virus, the Legal Meaning of "Handicap," and Implications for Public Education Under Federal Law at the Dawn of the Age of the ADA*, 77 IOWA L. REV. 1389, 1444 (1992). In addition, the ADA states that it does not "apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 [which includes section 504] or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a). This provision demonstrates that Congress was aware of and approved of the "societal attitude" regulation and other section 504 regulations when it passed the ADA in 1990.

168. Courts do not always see this avenue, either. Numerous courts have held that even if an employer terminates an employee because of a negative attitude toward the employee's physical impairment, the employee has not been substantially limited in working due to the attitudes of others and, therefore, is not disabled. See, e.g., *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 172-74 (4th Cir. 1997) (en banc) (basing analysis of the "regarded as" prong on whether the employer regarded the employee as having a substantially limiting impairment, rather than on whether the employer's attitude toward the employee's HIV status caused his dismissal); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (requiring that "other people treat [the plaintiff] as having a substantially limiting impairment" in order for the plaintiff to qualify as disabled under the "regarded as" prong); see also *infra* notes 369-413 and accompanying text (discussing the "regarded as" prong).

B. Judicial Applications of the ADA's Disability Definition

Courts, of course, are bound to decide ADA cases in accordance with the tangled language of the statute's definition of disability. Since the definition first appeared in the Rehabilitation Act, judicial decisions have shown signs of confusion and inconsistency regarding its application to specific facts. By taking the three-prong test at its word, courts have thrown out cases that Congress surely intended to go forward.¹⁶⁹ While one commentator predicted that the passage of the ADA would ameliorate interpretive problems regarding "major life activities" and other elements of the disability definition,¹⁷⁰ such has not been the case. In fact, a recent study conducted by the American Bar Association's Commission on Mental and Physical Disability Law revealed that the definition is "much more restrictive than those who drafted and supported the ADA had thought it would be" and has resulted in the summary dismissal of a large number of cases between 1992 and 1998.¹⁷¹ For example, cases decided under the ADA have found diseases as serious as hemophilia, diabetes, and cancer not to satisfy the statutory elements of a disability,¹⁷² even though legislative history indicates that Congress did not intend such results.¹⁷³ Recently, the Supreme Court examined the ADA's

169. See *infra* notes 247-52, 255-56, 302-11, 317-23, 327-32, 339-43, 353-55, 367-68, and 381-93 and accompanying text.

170. See Burgdorf, *supra* note 44, at 449.

171. *Employers Win*, *supra* note 8, at 405. The study found that in judicial cases in which one party clearly prevailed, 92% of decisions favored employers. See *id.* at 404. About one third of employer wins occurred through summary judgment. See *id.*

172. See, e.g., *Bridges v. City of Bossier*, 92 F.3d 329 (5th Cir. 1996) (holding that plaintiff with hemophilia was not disabled), *cert. denied*, 117 S. Ct. 770 (1997); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996) (holding that a plaintiff with cancer was not disabled); *Schluter v. Industrial Coils, Inc.*, 928 F. Supp. 1437 (W.D. Wis. 1996) (finding that a plaintiff with diabetes was not disabled). A recent study noted that in 110 cases decided during late 1995 and 1996, courts failed to deem a challenged condition a "disability" in 80 cases and reached no determination on the issue in 24 cases. See Thomas D'Agostino, *Defining "Disability" Under the ADA: 1997 Update*, Nat'l Disability L. Rep., Special Rep. No. 3 (LRP) 13 (1997). These statistics indicate that "challenging a plaintiff's status as an individual with a disability under the ADA is a defense tactic that is being utilized with increasing frequency . . . [and is], on the whole, an amazingly successful strategy for employers." *Id.* at iii.

173. Congress deliberately defined "disability" broadly. See H.R. REP. NO. 101-485, pt. 2, at 51-54 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332-36. For example, Congress specifically intended the category of individuals with disabilities to include those whose impairments are corrected by auxiliary aids or medications, see *id.* at 52-53, *reprinted in* 1990 U.S.C.C.A.N. at 334; those who are no longer disabled but have histories of disability, see *id.*; and those who have never been disabled at all but are regarded as being disabled, see *id.* at 53, *reprinted in* 1990 U.S.C.C.A.N. at 335.

disability definition,¹⁷⁴ but the guidance it could provide was limited by the inherently problematic statutory language. Many questions regarding the application of the three-prong test remain. Therefore, the lower courts will have to continue their rambling interpretative courses unless some change is made to the statutory language itself.

1. Judicial Interpretation of the "Major Life Activity" Element

a. Supreme Court Guidance from *Bragdon v. Abbott*

In *Bragdon v. Abbott*,¹⁷⁵ the U.S. Supreme Court addressed the issue of whether reproduction was a major life activity under the ADA. Deciding that it was, the Court offered some limited guidance that will direct lower courts when they analyze other activities in future cases. The *Bragdon* case arose when Sidney Abbott, the plaintiff, went to the office of the defendant, Randon Bragdon, for a dental examination.¹⁷⁶ Bragdon informed Abbott, who was HIV-positive but asymptomatic, that he would not be able to fill her cavity in his office because of the risk of infection.¹⁷⁷ He offered to perform the work at a hospital at no extra charge, although Abbott would have to pay for the use of the hospital facilities.¹⁷⁸ Abbott declined the offer and filed a discrimination suit against Bragdon under Title III of the ADA.¹⁷⁹

Although Title III's protections are not phrased in terms of a protected class of individuals with disabilities,¹⁸⁰ the district court,¹⁸¹ the First Circuit,¹⁸² and the Supreme Court¹⁸³ each began the analysis of the ADA claim by addressing whether Abbott's HIV-positive but asymptomatic status qualified her as disabled. The district court held that Abbott was indeed disabled and that Bragdon had discriminated against her as a matter of law.¹⁸⁴ It therefore granted Abbott summary judgment.¹⁸⁵ The First Circuit affirmed,¹⁸⁶ and Bragdon

174. See *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998).

175. 118 S. Ct. 2196 (1998).

176. See *id.* at 2201.

177. See *id.*

178. See *id.*

179. See *id.*

180. See *supra* note 113 (quoting the applicable Title III language).

181. See *Abbott v. Bragdon*, 912 F. Supp. 580, 585 (D. Me. 1995), *aff'd*, 107 F.3d 934 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998).

182. See *Abbott*, 107 F.3d at 938.

183. See *Bragdon*, 118 S. Ct. at 2201.

184. See *Abbott*, 912 F. Supp. at 587, 595.

185. See *id.*

186. See *Abbott*, 107 F.3d at 949.

appealed to the Supreme Court, arguing, among other things, that Abbott was not disabled because her asymptomatic HIV did not substantially limit her in any major life activities.¹⁸⁷

The only major life activity raised in the lower court and considered by the First Circuit was reproduction. The Supreme Court majority¹⁸⁸ therefore limited its analysis to this activity.¹⁸⁹ In deciding that reproduction is in fact a major life activity, the Court defined "major" in terms of "comparative importance" and "significance."¹⁹⁰ The Court reasoned that because "[r]eproduction and the sexual dynamics surrounding it are central to the life process itself,"¹⁹¹ reproduction must qualify as a major life activity. It explained that its holding was buttressed by administrative precedent¹⁹² in the form of a 1988 opinion issued by the Office of Legal Counsel of the Department of Justice ("OLC"), which noted that asymptomatic HIV qualifies as a disability under the Rehabilitation Act.¹⁹³ The OLC opinion stated that asymptomatic HIV could limit the " 'life activity of procreation.' "¹⁹⁴ The opinion, however, did not explain why the OLC had found procreation to be a major life activity. The Court also relied on agency regulations. It noted that regulations under the Rehabilitation Act specifically list working and learning as major life activities¹⁹⁵ and that "reproduction could not be regarded as any less important than working and learning."¹⁹⁶ The Court rejected Bragdon's argument, based on the regulatory list, that major life activities must have a "public, economic, or daily character."¹⁹⁷ Citing the "breadth" of the term

187. See *Bragdon*, 118 S. Ct. at 2205.

188. Justice Kennedy authored the Court's opinion. See *id.* at 2200. He was joined in the majority by Justices Stevens, Souter, Ginsburg, and Breyer. See *id.* Justice Ginsburg filed her own concurring opinion, see *id.* at 2213 (Ginsburg, J., concurring), as did Justice Stevens, see *id.* (Stevens, J., concurring). Justice Breyer joined in Justice Stevens's concurrence. See *id.* (Stevens, J., concurring).

189. See *id.* at 2205.

190. *Id.*

191. *Id.*

192. See *id.* at 2207 ("[T]he well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944))).

193. See *id.* (citing Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-65 (1988)).

194. *Id.* (quoting 12 Op. Off. Legal Counsel at 273).

195. See *id.* at 2205 (citing 28 C.F.R. § 41.31(b)(2) (1998); 45 C.F.R. § 84.3(j)(2)(ii) (1998)).

196. *Id.*

197. *Id.*

"major," the Court held that the word referred to general importance rather than frequency, publicity, or lucrativeness.¹⁹⁸ While the activities on the regulatory list might be characterized in these terms,¹⁹⁹ the Court noted that the words "such as," which preface the list, mean that activities that are important for other reasons can qualify as well.²⁰⁰

In a concurring opinion, Justice Ginsburg employed a much broader analysis that discussed activities other than reproduction.²⁰¹ She noted that HIV "has been regarded as a disease limiting life itself" and that it "inevitably pervades life's choices: education, employment, family and financial undertakings."²⁰² Citing regulations issued under the Rehabilitation Act,²⁰³ she listed maintaining family relations, securing employment, and caring for oneself as among the major life activities that HIV limits.²⁰⁴ Her common-sense opinion did not labor over the nuances of the word "major" or the technicalities of how and when such major activities might be limited. Instead, it was driven by the overarching notion that "[n]o rational legislator . . . would require nondiscrimination once symptoms become visible but permit discrimination when the disease, though present, is not yet visible."²⁰⁵ She began with the proposition that any reasonable person would have to consider HIV a disability and proceeded, in general terms, to connect this idea to

198. See *id.*

199. See *id.*

200. See *id.*

201. See *id.* at 2213 (Ginsburg, J., concurring).

202. *Id.* (Ginsburg, J., concurring).

203. See 28 C.F.R. § 41.31(a) (1998) (providing DOJ regulation defining "handicapped person"); 45 C.F.R. § 84.3(j)(1) (1998) (providing the Department of Health and Human Services regulation defining "handicapped person").

204. See *Bragdon*, 118 S. Ct. at 2214 (Ginsburg, J., concurring).

205. *Id.* at 2213-14 (Ginsburg, J., concurring). The majority in *Bragdon* remarked upon the "uniformity of the administrative and judicial precedent construing the definition" of "disability" in the Rehabilitation Act to include both symptomatic and asymptomatic HIV infection. *Id.* at 2208. Because this precedent existed when Congress repeated the "disability" definition in the ADA, the *Bragdon* majority reasoned that Congress intended to incorporate this interpretation into the newer statute. See *id.* This view is consistent with the HIV-as-one-disease argument articulated by Buss. See Buss, *supra* note 167, at 1428. According to Buss, this argument "has the disadvantage of depending on an artificial construct under which the third [symptomatic] stage of the disease is treated as if it had already occurred, even though it might not occur for years into the future." *Id.* at 1429. However, because societal misperceptions stem from fears of the third, and deadly, stage of the disease, and because discrimination based on these fears can occur even against individuals whose infections have not yet reached that stage, the collapsing of the stages into a single disease is an appropriate analytical step in a disability discrimination case.

various possible major life activities. This analysis recognizes both Congress's intent to include diseases such as asymptomatic HIV as a disability²⁰⁶ and the fact that the language of the definition does a poor job of reflecting this intent.²⁰⁷

In a separate opinion, Chief Justice Rehnquist²⁰⁸ wrote that reproduction cannot qualify as a major life activity under the ADA. Unlike the majority, Chief Justice Rehnquist defined "major" as "'greater in quantity, number, or extent.'" ²⁰⁹ He noted that this definition is more consistent with the list of major life activities in the ADA regulation than is the majority's definition, which focused on significance and importance.²¹⁰ Chief Justice Rehnquist acknowledged the importance of reproduction to human life, but noted that "[f]undamental importance of this sort is not the common thread linking the . . . listed activities. The common thread is rather that the activities are repetitively performed and essential in the day-to-day existence of a normally functioning individual."²¹¹ Because reproduction does not share this thread, Chief Justice Rehnquist did not deem it a major life activity.²¹² Justice O'Connor, writing separately, echoed this view: "[T]he act of giving birth to a child, while a very important part of the lives of many women, is not generally the same as the representative major life activities of all

206. The legislative history of the ADA indicates that lawmakers understood that the Act would cover anyone infected with HIV. See H.R. REP. NO. 101-485, pt. 2, at 31, 48 (1990), reprinted in 1990 U.S.C.A.N. 303, 313, 330 (citing PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, REPORT OF THE PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 123 (June 1988)); S. REP. NO. 101-116, at 22 (1989); see also Robert A. Kushen, Note, *Asymptomatic Infection with the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563, 567 (1988) (noting that "congressional intent to establish consistent and uniform standards of coverage would be furthered by giving protection to asymptomatic HIV carriers as well as AIDS victims" under the identically worded disability definition in the Rehabilitation Act).

207. See, e.g., Wendy E. Parmet & Daniel J. Jackson, *No Longer Disabled: The Legal Impact of the New Social Construction of HIV*, 23 AM J.L. & MED. 7, 41 (1997) (criticizing "plain language" interpretations of the statutory definition as overlooking the true intent of the drafters).

208. Justices Scalia and Thomas joined in Chief Justice Rehnquist's opinion. See *Bragdon*, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Justice O'Connor joined the opinion as to the issue of whether Abbott posed a direct threat, but drafted her own opinion as to whether Abbott was disabled. See *id.* at 2217 (O'Connor, J., concurring in the judgment in part and dissenting in part).

209. *Id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting WEBSTER'S COLLEGIATE DICTIONARY 702 (10th ed. 1994)).

210. See *id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

211. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

212. See *id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

persons . . . listed in [the] regulations."²¹³

Chief Justice Rehnquist also rejected the notion that reproduction automatically should qualify in light of regulations issued under the ADA that define the term "physical impairment" to include disorders affecting the reproductive system.²¹⁴ He wrote that "this argument is simply wrong" and noted that reproductive disorders can limit one's ability "to engage in numerous activities other than reproduction."²¹⁵ While the majority did not address this argument, one lower court in *Zatarain v. WDSU-Television, Inc.*²¹⁶ has confronted the issue of whether a physiological function referenced in the regulatory definition of "impairment" automatically becomes a "major life activity."²¹⁷ In *Zatarain*, the court expressed the implied reasoning behind Chief Justice Rehnquist's similar conclusion: "[T]he major life activity that is allegedly limited is separate and distinct from the impairment that limits it."²¹⁸ To hold otherwise, the court noted, "would allow [a litigant] to bootstrap a finding of substantial limitation of a major life activity on to a finding of an impairment."²¹⁹

Finally, Chief Justice Rehnquist offered more case-specific reasons for rejecting reproduction as a major life activity. Noting that the statutory language refers to "'one or more . . . major life activities of such individual,'"²²⁰ he wrote that the generalized analysis of the majority "truncates the question, perhaps because there is not a shred of record evidence indicating that, prior to becoming infected with HIV, [Abbott's] major life activities included

213. *Id.* at 2217 (O'Connor, J., concurring in the judgment in part and dissenting in part). It is unclear what Justice O'Connor means by the words "all persons." The only universally performed activity on the regulatory list is "breathing." See *supra* note 143 and accompanying text. Her previous reference to "the lives of many women" may indicate that if an activity cannot be performed at all by some group of unimpaired people (in this case, males), then it cannot qualify as a major life activity.

214. See *Bragdon*, 118 S. Ct. at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (citing 28 C.F.R. § 36.104 (1998) (providing the DOJ regulation implementing Title III of the ADA)).

215. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

216. 881 F. Supp. 240 (E.D. La. 1995), *aff'd mem.*, 79 F.3d 1143 (5th Cir. 1996) (unpublished table decision).

217. See *id.* at 243 (holding that a plaintiff with a reproductive disorder was not disabled because reproduction was not a major life activity).

218. *Id.*

219. *Id.*; see also Parmet & Jackson, *supra* note 207, at 26-27 (discussing the notion of deriving major life activities from specific physical impairments).

220. *Bragdon*, 118 S. Ct. at 2214 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting 42 U.S.C. § 12102(2)(A) (1994)).

reproduction.”²²¹ Under Chief Justice Rehnquist’s interpretation, a plaintiff would have to show that a particular act is “a major life activity to her.”²²² He would require a plaintiff relying on the activity of reproduction to muster evidence showing that she “would have had or was even considering having children” before her impairment arose.²²³ In Abbott’s case, the record showed nothing regarding Abbott’s plans for a family before she became infected; it revealed only that she had decided, upon learning of her HIV, not to have children.²²⁴ The majority in *Bragdon* did not explicitly address the issue of whether a major life activity must be specific to the plaintiff. By speaking of reproduction in general terms, however, its opinion implies that specificity is not required.²²⁵

b. Questions Remaining for the Lower Courts

(1) Which Activities Are Significant Enough to Be Deemed “Major”?

While the Court in *Bragdon* definitively answered the question of whether reproduction qualifies as a major life activity,²²⁶ at least in terms of a female plaintiff of child-bearing age, it has left open many issues regarding the application of the “major life activity” element. First, by defining “major” as “significant,” the opinion permits lower courts to assess the comparative significance of any activities that plaintiffs might raise. Few questions could be more subjective than the comparative general importance of various human activities. Indeed, even a court employing the definition of “major” espoused by the *Bragdon* majority could reach the opposite result on the

221. *Id.* at 2214-15 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

222. *Id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); see also *id.* at 2217 (O’Connor, J., concurring in the judgment in part and dissenting in part) (“[D]isability should be evaluated on an individualized basis and . . . [Abbott] has not proven that her asymptomatic HIV status substantially limited one or more of her major life activities.”).

223. *Id.* at 2215 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

224. See *id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

225. The only mention of reproduction in the context of Sidney Abbott’s life appears in the following sentence: “Respondent’s claim throughout this case has been that the HIV infection placed a substantial limitation on her ability to reproduce and to bear children.” *Id.* at 2204 (emphasis added). The remainder of the opinion discusses reproduction, and the limits posed on it by HIV, in only general terms. In her separate opinion, Justice Ginsburg speaks exclusively in general terms, referring to HIV’s limiting effects on “life itself” and “life’s choices.” *Id.* at 2213 (Ginsburg, J., concurring).

226. See *supra* notes 188-200 and accompanying text.

question of whether reproduction is major in this sense.²²⁷

Had *Bragdon* been decided years ago, it is hard to tell what help it would have offered to courts faced with deciding whether a given activity was major. For example, in *United States v. Happy Time Day Care Center*,²²⁸ another HIV-related case at the district court level, the plaintiff's argument regarding disability turned on the activities of "growing" and "socializing," among others.²²⁹ The case concerned several day care centers that had refused to admit an HIV-positive three-year-old boy.²³⁰ The district court avoided the question of whether growing and socializing were major life activities by first determining that the boy was not limited in these activities.²³¹ Nevertheless, if the court had been obligated to address the question, it would have had to make a determination with little or no guidance from the statute, the regulations, or the higher courts.

Even if the Supreme Court's opinion in *Bragdon* had been available, the district court would have known from the highest court only that it was supposed to assess the relative importance of growing and socializing, as compared to other known major life activities such as hearing, breathing, working, learning, and now—after *Bragdon*—reproduction. The universal physical function of growing would probably make the grade, but socializing is a much more difficult question. Another district court has implied that "interacting with others" is a major life activity,²³² but the Eighth Circuit has held that "caring for others" is not.²³³ It is easy to see how future courts,

227. See *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 170 (4th Cir. 1997) (en banc) ("We agree that procreation is a fundamental human activity, but are not certain that it is one of the major life activities contemplated by the ADA.").

228. 6 F. Supp. 2d 1073 (W.D. Wis. 1998).

229. See *id.* at 1074.

230. See *id.*

231. See *id.* at 1081.

232. See *Krocka v. Bransfield*, 969 F. Supp. 1073, 1083-84 (N.D. Ill. 1997).

233. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 677 (8th Cir. 1996). The *Krauel* court's reasoning is, to be charitable, obscure. First, the court noted that caring for others was not one of the illustrative major life activities listed in the ADA regulations. See *id.* The court put great weight on this fact, even though it recognized that the list is explicitly non-exclusive. See *id.* Second, the court noted that the plaintiff's alleged disability "in no way prevented her from performing her full job duties as a respiratory therapist." *Id.* Oddly, on this basis, the court went on to "conclude, then, that to treat . . . caring for others as [a] major life activit[y] under the ADA would be inconsistent with the illustrative list of activities in the regulations, and a considerable stretch of federal law." *Id.* The court did not explain why caring for others is inconsistent, but one must expect obscure reasoning in cases governed by obscure statutory language. Even after *Bragdon*, it is hard to formulate concrete legal arguments on this issue because *Bragdon* commands the court simply to weigh the relative importance of caring for others in abstract terms. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998).

following the *Bragdon* Court's command to weigh the relative importance of given activities, will continue to rule inconsistently on such abstract questions.

In addition to growing and socializing, sex—another higher-order human activity—has surfaced in Fourth Circuit case law as a possible major life activity.²³⁴ The Fourth Circuit's holding that "engaging in intimate sexual relations" is not a major life activity²³⁵ may now be overruled by the words of the Supreme Court in *Bragdon*: "Reproduction falls well within the phrase 'major life activity.' Reproduction and the sexual dynamics surrounding it are central to the life process itself."²³⁶ The Supreme Court considered only procreative sex, however; still open is the question of whether sex that is engaged in for non-procreative reasons is a major life activity. Whether appellate courts are in a better position than any other societal body to weigh the relative significance of this type of activity is also an open question.

Other abstract activities that have presented themselves include exercising good judgment,²³⁷ commuting to work,²³⁸ taking tests,²³⁹ and flying in airplanes.²⁴⁰ As arguments about major life activities grow more creative, the case law begins to look more bizarre. For example, a more mundane activity, lifting, apparently can qualify as "major" if it involves fifteen pounds or less,²⁴¹ but does not qualify if

234. See *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 170-71 (4th Cir. 1997) (en banc).

235. See *id.* at 171.

236. *Bragdon*, 118 S. Ct. at 2205.

237. See *Hindman v. GTE Data Servs., Inc.*, No. 93-1046-CIV-T-17C, 1994 WL 371396, at *1 (M.D. Fla. June 24, 1994). In *Hindman*, the plaintiff suffered from a chemical imbalance that affected his behavior. See *id.* The court noted that "personality traits that are commonplace or characteristics within the 'normal' range are excluded from protection. However, when poor judgment is a symptom of a mental or psychological disorder it is defined as an impairment that would qualify as a disability under the ADA." *Id.* at *3.

238. See *Poindexter v. Atchison, Topeka & Santa Fe Ry. Co.*, 975 F. Supp. 1387, 1390-91 (D. Kan. 1997) (rejecting defendant's argument that commuting was not, as a matter of law, a major life activity).

239. See *Tatum v. N.C.A.A.*, 992 F. Supp. 1114, 1123 (E.D. Mo. 1998). While the plaintiff had argued that he was substantially limited in the major life activity of test taking, the *Tatum* court, in denying his motion for a preliminary injunction, did not reach the issue because it failed to find a likelihood of success on the merits regarding his need for accommodation. See *id.*

240. See *Cannizzaro v. Neiman Marcus, Inc.*, 979 F. Supp. 465, 476 (N.D. Tex. 1997) (finding no basis in the regulations or case law to hold that flying is a major life activity).

241. See *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (10th Cir. 1996) (finding a general issue of material fact as to whether the ability to lift more than 15 pounds is substantially limited by the plaintiff's multiple sclerosis); see also 29 C.F.R. pt.

it involves forty-five pounds or more.²⁴² It is doubtful that *Bragdon* will be of any use in helping courts determine when lifting takes on significance equal to that of hearing, seeing, working, and other confirmed major life activities. Most courts would probably agree that universal human functions, such as eating and sleeping,²⁴³ pass *Bragdon's* test. When the alleged activity is too general, however, the analysis spins out of control. In addition to growing and socializing, the plaintiff in *Happy Time Day Care Center* proposed that "living" be considered a major life activity.²⁴⁴ Only statutory language as twisted as the ADA's disability definition could prompt a court to write that "living is not a major life activity."²⁴⁵ The *Happy Time Day Care Center* court was concerned that "such an expansive construction . . . would likely yield bizarre and unintended results not far down the road."²⁴⁶ Perhaps the most bizarre aspect of this issue is simply that the court, under the ADA's text, was even asked to assess whether "living" was a "major life activity" in the first place.

(2) *How Should Courts Determine the Scope of Allegedly "Major" Life Activities?*

Of course, before courts can assess the relative importance of a given activity, they must define its scope. In *Reeves v. Johnson Controls World Services, Inc.*,²⁴⁷ the Second Circuit feared that plaintiffs could manipulate the scope of alleged major life activities to suit their individual cases and that such manipulation would expand the ADA's coverage beyond the truly disabled:

For example, while it might be hard to show that a very mild cough substantially limits the major life activity of "breathing," it would be far easier to make an individualized showing of a substantial limitation if the major life activity were instead defined more narrowly as, say, the major life activity of "breathing atop Mount Everest". . . . Narrowing

1630, app. § 1630.2(i) (1998) ("[O]ther major life activities include, but are not limited to, sitting, standing, lifting, [and] reaching.").

242. See *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1120 (5th Cir. 1998) (holding that a plaintiff who suffered from a back injury could lift 45 pounds only occasionally was not limited in a major life activity).

243. See, e.g., *Gonsalves v. J.F. Fredericks Tool Co.*, 964 F. Supp. 616, 621 (D. Conn. 1997) (noting that eating and sleeping are major life activities); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 814 (N.D. Tex. 1994) (same).

244. See *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1074 (W.D. Wis. 1998).

245. *Id.* at 1081-82.

246. *Id.* at 1082.

247. 140 F.3d 144 (2d Cir. 1998).

and diluting the definition of a major life activity, which in turn might lessen the plaintiff's burden of proving a substantial limitation, would undermine the role of the statute's "substantial limit[ation]" inquiry in ensuring that only impairments of some significance are protected by the ADA.²⁴⁸

In *Reeves*, the plaintiff, who suffered from a panic disorder coupled with agoraphobia (the fear of being in public places), argued that this condition substantially limited him in "everyday mobility."²⁴⁹ Specifically, he defined the term using examples of acts he could not perform: "taking vacations," "going to a shopping mall alone," and traveling "along a route which might cause [one] to cross a bridge or tunnel."²⁵⁰ The Second Circuit rejected "everyday mobility," as defined by the plaintiff, as a major life activity because "[i]f the courts permit individual tailoring of the scope of the major life activity, the case-by-case inquiry into whether an impairment entails a 'substantial limit[ation]' is essentially fixed from the outset—it is, in short, pre-determined by a plaintiff."²⁵¹ The distrust evident in the *Reeves* opinion coincides with society's desire to assist only the "truly disabled" and to view those with invisible impairments with suspicion.²⁵² This distrust, in turn, led the court to overlook the obvious disability of a man who apparently has severe difficulties functioning in the modern world.

A rare example of an expansive reading of a major life activity appears in *Happy Time Day Care Center*, which addressed the activity of "caring for oneself."²⁵³ In denying the defendant's motion for summary judgment, the court held that an inference could be drawn that the HIV-positive three-year-old plaintiff was substantially limited in caring for himself because of his body's compromised

248. *Id.* at 152 (alteration in original).

249. *See id.*

250. *Id.* at 153.

251. *Id.*

252. *See supra* note 150. A case involving a similarly invisible emotional disability is *Calvarese v. Oswego*, No. 96-CV-602 (FJS), 1998 WL 315091, at *1 (N.D.N.Y. June 10, 1998), which was dismissed on summary judgment because the plaintiff was found not disabled as a matter of law. *See id.* at *2. While the plaintiff presented evidence that he had been diagnosed as "emotionally disturbed" as a child and continued to display aggressive behavior, he had not specified a particular major life activity in which he was substantially limited. *See id.* The court noted that it "fail[ed] to see" how the plaintiff's occasional aggression "significantly limits any major life function," *id.*, despite the fact that the case itself concerned a violent outburst that led to the plaintiff's suspension from an amateur hockey league, *see id.* at *1.

253. *See United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 1073, 1074 (W.D. Wis. 1998).

"ability to fight off common, relatively mild infectious agents without the need of serious medical intervention."²⁵⁴ Other courts, however, so far have been unwilling to characterize functions at the cellular level as major life activities.

This refusal is evident in several decisions holding that plaintiffs with cancer were not disabled.²⁵⁵ While such plaintiffs may suffer from a disease which, if untreated, will destroy their bodies, they must still demonstrate a limitation in an activity such as working, walking, or speaking in order to maintain a discrimination suit.²⁵⁶ Chief Justice Rehnquist's opinion in *Bragdon* exhibits a similar line of thought: plaintiffs should not be able automatically to transform impairments of various body systems into limitations on major life activities.²⁵⁷ Because the *Bragdon* majority did not address this issue, it is unclear whether courts can allow physiological functions to qualify as major life activities. The regulatory list of illustrative activities is equally unhelpful on this point because at least one activity—breathing—is itself a physiological function, but most of the other activities, such as learning and working, are substantially more abstract. Further, with regard to sensory functions, the Department of Justice has opined that using the sense of smell is not a major life activity,²⁵⁸ although hearing and seeing are specifically listed as such in the ADA regulations issued by the EEOC and the Department of Justice.²⁵⁹ One can only speculate about touching and tasting.

Because most courts have not accepted physiological functions as major life activities, plaintiffs with physiological impairments that have not yet reached the point of substantially limiting their daily

254. *Id.* at 1081.

255. *See, e.g.,* *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996) (holding that plaintiff with breast cancer did not have a disability); *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977, 981 (N.D. Ill. 1997) (holding that employee with non-Hodgkins lymphoma, a form of cancer, who continued to work did not have a disability); *Malewski v. NationsBank of Fla., N.A.*, 978 F. Supp. 1095, 1100-01 (S.D. Fla. 1997) (same).

256. *See, e.g., Ellison*, 85 F.3d at 190-91 (holding that the plaintiff was not limited in working when her cancer was controlled through radiation therapy); *Hirsch*, 989 F. Supp. at 981-82 (holding that the plaintiff had not met her burden of producing evidence showing that her deceased spouse had been actually limited or perceived as limited in any major life activity when the plaintiff's evidence showed only that her spouse had had cancer); *Malewski*, 978 F. Supp. at 1100-01 (holding that the plaintiff was not perceived as being limited in working where her cancer was controlled through radiation therapy).

257. *See Bragdon v. Abbott*, 118 S. Ct. 2196, 2215-16 (1998) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

258. Policy Letter Authored by L. Irene Bowen, Deputy Director, Office on the Americans with Disabilities Act, U.S. Dept. of Justice (June 2, 1992), *reprinted in* 3 Nat'l Disability L. Rep. (LRP) ¶ 290 (Apr. 28, 1993).

259. *See* 29 C.F.R. § 1630.2(i) (1998); 28 C.F.R. §§ 35.104, 36.104 (1998).

activities have frequently resorted to "working" as the major life activity upon which to hang their arguments regarding disability.²⁶⁰ This tactic makes sense in that many of the cases concern employers who allegedly fail to provide workplace accommodations or deny the plaintiffs job opportunities because of their impairments.²⁶¹ Many of these plaintiffs, however, never get to argue that their employers' acts were motivated by the plaintiffs' impairments because the EEOC and the courts²⁶² have defined "working" in such a way as to make it almost impossible to prove the threshold element of disability by showing a substantial limitation in the major life activity of working.²⁶³ To show such a limitation, a plaintiff must prove significant restrictions "in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities."²⁶⁴ Thus, "working" does not refer to a plaintiff's ability to perform her own particular job; rather, it refers to broader notions of employability.

Under this interpretation, a qualified plaintiff whose impairment has interfered with her job performance may have no recourse if her employer fails to provide a reasonable, low-cost accommodation that would allow her to perform effectively and then fires her. Unless she can prove disability by proving that her impairment would limit her in a broad range of jobs, her case will be thrown out before she can prove that her employer may have been motivated by disability-related prejudice. Thus, the scope that the courts accord to a given major life activity can make or break a legitimate discrimination case at the outset. Because the range of potential major life activities is unlimited, it is impossible for Congress, the EEOC, the Justice Department, or the Supreme Court to clarify the scope of every activity a plaintiff might put at issue. Therefore, possible variations

260. For a discussion of the problems inherent in viewing working as a major life activity, see generally Steven S. Locke, *The Incredible Shrinking Protected Class: Redefining the Scope of Disability Under the Americans with Disabilities Act*, 68 U. COLO. L. REV. 107 (1997) (advocating the elimination of working as a major life activity in ADA analysis). For a discussion of cases in which plaintiffs used "working" as a major life activity, see *infra* notes 312-26 and accompanying text.

261. See *infra* notes 312-26 and 375-93 and accompanying text for a discussion of cases raising the issue of the major life activity of working.

262. For a discussion of how courts have interpreted the "substantial limitation" element in relation to the major life activity of working, see *infra* notes 312-26 and accompanying text.

263. See Locke, *supra* note 260, at 135 ("[C]laims in which plaintiffs have only alleged a substantial limitation in the major life activity of working have been almost universally rejected.").

264. 29 C.F.R. § 1630.2(j)(3)(i).

in breadth continue to inject yet another element of uncertainty into the "major life activity" analysis, even after *Bragdon*.

(3) *Must the Significance of a Major Life Activity Be Specific to the Plaintiff?*

Finally, the Supreme Court in *Bragdon* left open the issue of whether a major life activity must be analyzed in terms of the specific plaintiff. While Chief Justice Rehnquist's opinion answered this question in the affirmative by seizing on the statutory words "major life activity of such individual," the majority did not address the question directly.²⁶⁵ Although the *Bragdon* majority discussed the major life activity of reproduction in general terms rather than in specific relation to the plaintiff, Sidney Abbott, it could do so only because it was understood that Abbott made a personal, specific decision not to have children because of her HIV and, therefore, that reproduction would have been a major life activity in which she personally would have engaged. Of course, it is also possible that the generality of the majority's discussion of reproduction indicates that it does not matter whether the activity would have played a major role in Sidney Abbott's life; what matters is only that reproduction is a major part of human life in general. The First Circuit, in deciding *Abbott*, noted that an argument based on requiring Sidney Abbott to prove that reproduction was a major life activity to her personally was dubious.²⁶⁶ It left open the question of whether such a specific showing was necessary, however, because it determined that the record proved substantial limitations in reproduction in both the general and specific sense.²⁶⁷

Previous cases involving HIV-infected children have placed the specificity requirement more directly at issue and have revealed some absurdities inherent in the "major life activity" test itself. In *Ennis v. National Ass'n of Business & Educational Radio*²⁶⁸ a former employee brought suit against her employer alleging that the employer terminated her because it feared that her adopted son, who was HIV-positive but asymptomatic, would contract future illnesses

265. See *supra* notes 220-25 and accompanying text.

266. See *Abbott v. Bragdon*, 107 F.3d 934, 941 (1st Cir. 1997), *vacated*, 118 S. Ct. 2196 (1998); see also *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 170 (4th Cir. 1997) (en banc) ("[C]ourts need only consider whether the impairment at issue substantially limits the plaintiff's ability to perform one of the major life activities contemplated by the ADA, not whether the particular activity that is substantially limited is important to him.").

267. See *Abbott*, 107 F.3d at 941.

268. 53 F.3d 55 (4th Cir. 1995).

that would adversely affect the employer's health insurance rates.²⁶⁹ Joan Ennis, the plaintiff, based her suit on an ADA provision that prohibits employers from taking adverse employment action "because of the known disability of an individual person with whom the qualified individual is known to have a relationship or association."²⁷⁰ The Fourth Circuit held that Ennis's adopted son would qualify as "disabled" only if he had an impairment that substantially limited a life activity that was of particular importance to him personally.²⁷¹ The court noted, however, that the record as to the boy's limitations in life functions may not have been fully developed.²⁷²

Because the court was reviewing a grant of summary judgment in favor of the employer, it assumed that the boy was disabled and moved on to other dispositive issues.²⁷³ Had the court needed to decide definitively whether Joan Ennis's son was disabled, it is unclear, even after *Bragdon*, whether reproduction would have qualified as a major life activity in this case. Given that Ms. Ennis's son was a child and therefore unable to father children in any case, it seems illogical to speak in terms of reproduction being one of his major life activities that could have been limited at the time the defendant took its adverse action.

The U.S. District Court for the District of Wisconsin, faced with a similar fact situation in *Happy Time Day Care Center*, noted the absurdity of the question posed by the statutory "disability" definition: "[T]here is something inherently illogical about inquiring whether an individual's ability to perform a particular [life] activity is substantially limited by an external factor when, for entirely unrelated reasons, this individual is incapable of engaging in that activity in the first place."²⁷⁴ Because the case involved a three-year-old child, the court determined that the "correct and more logical application is to start by identifying those activities that are important in the life of a three year-old. Procreation does not make

269. See *id.* at 57.

270. 42 U.S.C. § 12112(b)(4) (1994); see also *Ennis*, 53 F.3d at 56-57 (explaining that Ennis alleged that her employer fired her because of her son's HIV).

271. See *Ennis*, 53 F.3d at 59 ("The term 'disability' is specifically defined . . . 'with respect to [the] individual' and the individualized focus is reinforced by the requirement that the underlying impairment substantially limit a major life activity of the individual." (alteration in original)).

272. See *id.* at 60.

273. See *id.*

274. *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1080 (W.D. Wis. 1998).

this list."²⁷⁵ By employing an expansive definition of "caring for oneself,"²⁷⁶ the court was able to hold that the three-year-old could indeed be limited in a major life activity.²⁷⁷ However, the statutory language forced the court to go through some impressive gymnastics in order to reach a perfectly common sense result.²⁷⁸

The major life activities cases discussed above do not map out a consistent scheme of analysis regarding this element of the ADA definition of disability, and it is doubtful that *Bragdon* will add uniformity to future analyses of any of these issues. What the cases do consistently show is that the statutory definition poses the wrong questions. After all, under the ADA's disability definition, Sidney Abbott's routine trip to the dentist eventually led to nine Supreme Court Justices sitting down to philosophize about the role of reproduction in human existence.²⁷⁹ The *Bragdon* majority apologized for being "legalistic,"²⁸⁰ but it had no choice, given the statutory language it had to follow. As three levels of the court system considered such "legalisms," almost four years passed between the time Abbott's dentist refused to treat her in his office, admittedly because of her HIV, and the time she definitively learned she had the required "disabled" status to bring a discrimination suit.²⁸¹ When such a relatively straightforward case travels such a long and winding route to an obvious conclusion, one wonders about the statutory guides that have directed it through such a process. The statutory "major life activity" language seems a particularly poor

275. *Id.* The court cited *Knapp v. Northwestern University*, 101 F.3d 473, 479-80 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 2454 (1997), for the proposition that "major life activities" should be defined in an individualized manner during the "substantial limitation" analysis. See *Happy Time Day Care Ctr.*, 6 F. Supp. 2d at 1080; see also *Bartlett v. New York State Bd. of Law Exam'rs*, 2 F. Supp. 2d 388, 393-95 (S.D.N.Y. 1997) (applying an individualized analysis and holding that "working" could be a major life activity of a law school graduate who had not yet passed the bar examination, even if it was not a major life activity of medical students who had not yet finished their studies), *aff'd in part and vacated in part*, 156 F.3d 321 (2d Cir. 1998).

276. See *supra* notes 253-54 and accompanying text.

277. See *Happy Time Day Care Ctr.*, 6 F. Supp. 2d at 1081.

278. See *id.* at 1080-81.

279. In this role, the Justices were not unlike the eighteenth-century philosophers who sought to identify those activities that properly define human existence. See *supra* note 145.

280. *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998).

281. The Supreme Court remanded the case to the First Circuit to determine whether the defendant had presented evidence raising a factual issue as to whether Abbott's HIV would pose a direct threat to him were he to fill her cavity in his office. See *id.* at 2213. On remand, the First Circuit examined the direct threat issue and reaffirmed its holding of summary judgment in favor of Abbott. See *Bragdon v. Abbott*, No. 96-1643, 1998 WL 887125 (1st Cir. Dec. 29, 1998).

guide in discrimination cases.

2. Judicial Interpretation of the "Substantially Limits" Element

a. Supreme Court Guidance from *Bragdon v. Abbott*

After determining that reproduction was a major life activity, the Supreme Court in *Bragdon* went on to examine whether the plaintiff's HIV substantially limited this activity.²⁸² In short, the Court held that when the plaintiff's impairment makes a particular activity dangerous to the plaintiff or to others, and the plaintiff therefore reasonably decides to refrain from the activity, the impairment has "substantially limited" that activity.²⁸³ More specifically, the Court noted medical research indicating that the male sexual partner of a woman with HIV runs a "statistically significant risk" of contracting the infection.²⁸⁴ It also noted that women with HIV face approximately a 20% risk of transmitting the virus to their children.²⁸⁵ The Court concluded, therefore, that "[c]onception and childbirth are not impossible for an HIV victim but, without doubt, are dangerous to the public health. This meets the definition of a substantial limitation."²⁸⁶ The Court rejected the argument that the limitation could be discounted as a voluntary response on the part of the plaintiff, rather than an inherent restriction imposed by the impairment itself.²⁸⁷ Citing a 1988 opinion from the Office of Legal Counsel of the Department of Justice, the Court noted that "[t]he limitation . . . was the infection's manifest physical effect."²⁸⁸ The majority recognized a self-imposed limitation as reasonable in *Bragdon* because "HIV-infected individuals cannot, whether they are male or female, engage in the act of procreation with the normal expectation of bringing forth a healthy child."²⁸⁹

In dicta, the majority also noted that it had "little doubt that had

282. See *Bragdon*, 118 S. Ct. at 2205-07.

283. See *id.*

284. *Id.* at 2206. The Court cited a 1994 textbook on AIDS that collected 13 studies the cumulative results of which indicated that "20% of male partners of women with HIV became HIV-positive themselves." *Id.* (citing Dennis H. Osmand & Nancy Padian, *Sexual Transmission of HIV*, in *THE AIDS KNOWLEDGE BASE* 1.9-8 & tbl.2 (P.T. Cohen et al. eds., 2d ed. 1994)).

285. See *id.*

286. *Id.*

287. See *id.* at 2207.

288. *Id.* (citing Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals, 12 Op. Off. Legal Counsel 264, 264-65 (1988)).

289. *Id.* (citing 12 Op. Off. Legal Counsel at 273).

different parties brought the suit they would have maintained that an HIV infection imposes substantial limitations on other major life activities" as well.²⁹⁰ This comment implies that the Court is willing to interpret the idea of substantial limitations rather broadly to include not only present restrictions but also future restrictions that may arise as a disease progresses. Justice Ginsburg interpreted the element even more broadly in her own opinion, noting that HIV has been regarded as "limiting life itself" and that it "affects the need for and, as this case shows, the ability to obtain health care because of the reaction of others to the impairment."²⁹¹ Her opinion implied, but did not specify, that the way in which HIV affects the availability of health care is a substantial limitation. In addition, Justice Ginsburg specifically considered the disease in all its present and future stages, allowing her to take into account potential limitations in family relations, employment potential, and caring for oneself.²⁹²

In contrast, Chief Justice Rehnquist viewed the concept of limitation much more narrowly, and his analysis was much more closely tied to the literal language of the ADA. He equated "substantial limitation" with compromised physical ability.²⁹³ Therefore, he determined that "[w]hile individuals infected with HIV may choose not to engage in [procreation and child rearing], there is no support in language, logic, or our case law for the proposition that such voluntary choices constitute a 'limit' on one's own life activities."²⁹⁴ His interpretation of the definition would require the plaintiff to show that her HIV made her physically less able to reproduce.²⁹⁵ In addition, it would consider only those physical restrictions that the plaintiff was experiencing at the time of the alleged discrimination: "[T]he ADA's definition of a disability is met only if the alleged impairment substantially 'limits' (present tense) a major life activity. Asymptomatic HIV does not presently limit respondent's ability to perform any of the tasks necessary to bear or raise a child."²⁹⁶ Sidney Abbott contended that her disease would

290. *Id.* at 2205. The Court cited with approval, but did not specifically adopt, the EEOC's categorical conclusion that "an individual who has HIV infection (including asymptomatic HIV infection) is an individual with a disability." *Id.* at 2209 (citing 2 EEOC Compl. Man. (BNA) § 902.4(c)(1), at 35 (Mar. 1995)).

291. *Id.* at 2213 (Ginsburg, J., concurring).

292. *See id.* at 2214 (Ginsburg, J., concurring).

293. *See id.* at 2216 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

294. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

295. *See id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

296. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

make it unlikely that she would "live long enough to raise and nurture [a] child to adulthood." ²⁹⁷ However, Chief Justice Rehnquist responded that this argument, "taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects." ²⁹⁸

b. Questions Remaining for the Lower Courts

(1) *How Substantial Must a "Substantial" Limit Be?*

While the Court in *Bragdon* clarified that a substantial limitation on a major life activity can stem from a plaintiff's reasonable response to a threat posed by an impairment, the opinion does little to clarify the degree to which an activity must be limited when the connection between the impairment and the restriction is more direct. A number of courts have used the "substantial limitation" requirement as a fine screen to filter out cases brought by plaintiffs with all but the most serious mental and physical disorders. ²⁹⁹ Although such a narrow reading of the requirement appears inconsistent with legislative intent, ³⁰⁰ there is nothing in the statute or regulations ³⁰¹ to prevent the courts from following this course. A sampling of representative cases illustrates the problem.

The U.S. District Court for the Eastern District of Louisiana, for example, held that a plaintiff was not disabled despite the fact that he had muscle weakness, residual partial paralysis from polio, one leg longer than the other, and an approximate total body impairment of fifteen percent. ³⁰² The court reasoned that "[a]lthough plaintiff

297. See *id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (quoting Brief for the Respondent Sidney Abbott at 22, *Bragdon* (No. 97-156)).

298. *Id.* (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

299. See generally Burgdorf, *supra* note 11 (criticizing the narrow interpretation of this element, which allows courts to dismiss disability suits summarily before plaintiffs can present evidence regarding the allegedly discriminatory conduct of defendants).

300. Congress deliberately defined "disability" broadly. See H.R. REP. NO. 101-485, pt. 2, at 51-54 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 332-35. As to the "regarded as" prong, legislative history indicates that an employee should be covered "whether or not the employer's perception was shared by others in the field." *Id.*, pt. 3, at 30, reprinted in 1990 U.S.C.C.A.N. 445, 453.

301. See 29 C.F.R. § 1630.2(j) (1998) (defining "substantially limits" as "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity").

302. See *Stone v. Entergy Servs., Inc.*, No. 94-2669, 1995 WL 368473, at *1 (E.D. La. June 20, 1995).

cannot walk briskly, and has some trouble climbing stairs, . . . his ability to walk is not substantially limited nor significantly restricted."³⁰³ The Sixth Circuit recently came to a similar conclusion regarding a plaintiff whose shoulder and back injuries left him unable to perform his job as a deliveryman and, sometimes, to walk without pain.³⁰⁴

With respect to the major life activity of seeing, the U.S. District Court for the Eastern District of Pennsylvania recently held that a plaintiff was not actually substantially limited, despite a brain tumor behind his right eye that caused him to experience double and sometimes triple vision.³⁰⁵ The court emphasized that in applying the ADA's disability definition, courts must take a "pragmatic, fact-intensive look at each plaintiff."³⁰⁶ Ironically, the court praised the plaintiff for being able "to overcome his impairment admirably" by adjusting his line of vision, while at the same time holding that he did not satisfy the first prong of the disability definition.³⁰⁷

With respect to another activity—breathing—the U.S. District Court for the Middle District of Alabama held that a plaintiff with multiple chemical sensitivities had raised a factual issue as to whether she was substantially limited, but the court also noted that "defendants' evidence may fairly be said to strongly counter certain evidence plaintiff submits" on this issue.³⁰⁸ The plaintiff's sensitivities caused her to suffer severe reactions at work, where she was exposed to a variety of chemicals that did not affect other people.³⁰⁹ During one episode, she felt "as if her airway was 'closing off,' . . . she was light-headed and faint, and . . . she began 'sinking' to the floor."³¹⁰ She had to be removed from her workplace in a wheelchair and taken to a doctor's office.³¹¹

303. *Id.* at *4.

304. *See* Penny v. United Parcel Serv., 128 F.3d 408, 415 (6th Cir. 1997); *see also* Kelly v. Drexel Univ., 94 F.3d 102, 106 (3d Cir. 1996) (holding that a plaintiff with severe post-traumatic degenerative joint disease, which caused him to walk slowly, especially when climbing stairs, was not substantially limited in walking).

305. *See* Overturf v. Penn Ventilator Co., 929 F. Supp. 895, 898 (E.D. Pa. 1996).

306. *Id.* at 897.

307. *Id.* at 898. In the end, however, the court denied the defendant's motion for summary judgment, holding that the plaintiff had raised a factual issue as to whether he had been regarded as disabled under the third prong of the disability definition. *See id.* at 899.

308. Treadwell v. Dow-United Techs., 970 F. Supp. 962, 972 (M.D. Ala. 1997).

309. *See id.* at 965.

310. *Id.* at 971.

311. *See id.*

(2) *What Does It Mean to Be "Substantially Limited" in Working?*

The major life activity of working presents a unique dilemma with respect to the "substantially limited" requirement.³¹² Because the notion of working has been equated with general employability rather than with performing a particular job,³¹³ courts, following regulations promulgated by the EEOC,³¹⁴ have held that substantially limited in working means broadly limited in a wide range of jobs.³¹⁵ Thus, even an impairment that severely restricts a person from performing one job—or a narrow, specialized class of jobs—will not substantially limit that person in the major life activity of working. While this application of the "substantial limitation" element has been roundly criticized,³¹⁶ it is well-entrenched in the case law.

Dutcher v. Ingalls Shipbuilding,³¹⁷ for example, concerned a welder who was unable to climb due to a permanent injury to her arm.³¹⁸ She filed suit against her employer under the ADA after her employer informed her that it could no longer employ her due to this restriction.³¹⁹ The Fifth Circuit affirmed summary judgment for the employer, holding that the welder was not disabled because she was not substantially limited in working.³²⁰ Specifically, the court required the plaintiff to present "evidence that her disability prevents

312. For a detailed discussion of judicial and administrative analyses of limitations in working, see Locke, *supra* note 260, at 115-31.

313. See *supra* note 264 and accompanying text.

314. EEOC regulations state:

The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.

The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i) (1998).

315. See *infra* notes 317-26 and accompanying text.

316. See, e.g., Richard A. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L.J. 203, 235-42 (1993) (criticizing courts' application of the one-job-is-not-enough rule under the Rehabilitation Act as imposing an unreasonable burden on plaintiffs and leading to illogical, inequitable results); Burgdorf, *supra* note 11, at 439-69 (criticizing the one-job-is-not-enough rule in decisions under the Rehabilitation Act and the ADA); Locke, *supra* note 260, at 116 (criticizing as inequitable the burden placed upon ADA plaintiffs who must prove general limitations in employability); Bonnie P. Tucker, *The Americans with Disabilities Act Interpreting the Title I Regulations: The Hard Cases*, 2 CORNELL J.L. & PUB. POL'Y 1, 2-6 (1992) (criticizing the inconsistent results arising from the ADA regulations regarding substantial limitations in working).

317. 53 F.3d 723 (5th Cir. 1995).

318. See *id.* at 725.

319. See *id.*

320. See *id.* at 727.

her from performing an entire class of jobs."³²¹ Because the plaintiff showed only that she was limited in welding positions that required climbing, she did not meet this requirement.³²² Other circuit courts addressing similar issues are in agreement that a substantial limitation in working must involve more than a restriction affecting a single, specialized job.³²³ This interpretation, however, inequitably rewards employers who are the first to discriminate or who impose aberrant qualification criteria.³²⁴ It also imposes an unreasonable burden on the plaintiff, who must muster detailed demographic evidence regarding other available jobs.³²⁵ Most important, it ignores the impact of the loss of the job of one's choice, which is surely a "substantial limitation."³²⁶

A final illogical quirk that has arisen with respect to the "substantially limits" element is the allowance of facts indicating an *ability* to perform a particular job to negate showings of *inability* with respect to other major life activities. At least two district courts have taken this course. In *Overturf v. Penn Ventilator Co.*,³²⁷ for example, the plaintiff argued that he was substantially limited in his ability to see.³²⁸ The court bolstered its failure to find an actual limitation in seeing by noting the plaintiff's testimony "that his impairment never kept him from performing all of the tasks of his job."³²⁹ Further, in *Stone v. Entergy Services, Inc.*,³³⁰ the plaintiff argued that residual partial paralysis from polio, among other problems, substantially

321. *Id.*

322. *See id.*

323. *See* Homeyer v. Stanley Tulchin Assocs., 91 F.3d 959, 961 (7th Cir. 1996); Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997); Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1319 (8th Cir. 1996); Bolton v. Scrivner, Inc., 36 F.3d 939, 942-43 (10th Cir. 1994). One district court allowed a plaintiff to get around the "single job" rule by giving the plaintiff's individual restrictions a heavy cumulative weight. In *Eckles v. Consolidated Rail Corp.*, 890 F. Supp. 1391 (S.D. Ind. 1995), *aff'd*, 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1318 (1997), the plaintiff argued that his epilepsy prevented him from climbing stairs and working night shifts. *See id.* at 1399. The court, noting that "the test for substantial limitation encompasses non-work activities as well," held that a genuine issue of fact existed as to the plaintiff's disabled status, although it did not list specific other activities in which the plaintiff was limited. *Id.* In addition, in ruling on the parties' cross motions for summary judgment, the court put the burden on the defendant to show that other jobs existed that the plaintiff could perform. *See id.* at 1400.

324. *See* Bales, *supra* note 316, at 237, 240.

325. *See id.* at 239-40.

326. *See id.* at 241-42.

327. 929 F. Supp. 895 (E.D. Pa. 1996).

328. *See id.* at 898.

329. *Id.*

330. No. 94-2669, 1995 WL 368473, at *1 (E.D. La. June 20, 1995).

limited his ability to walk.³³¹ The *Stone* court similarly relied on "plaintiff's ability to work" in finding that he was not disabled, even though he did indeed have difficulty walking.³³²

(3) *Are Impairments "Substantially Limiting" If They Are Controlled Through Mitigating Measures?*

Another open question regarding the "substantially limits" element concerns whether courts may take treatments and other mitigating measures into account when deciding whether a given impairment substantially limits a given major life activity. While the defendant in *Bragdon* argued that the limits imposed by the plaintiff's HIV should be weighed in light of new medications that can lower the risk of perinatal transmission, the Court specifically refrained from deciding whether such consideration was proper.³³³ Because the medication would lower the risk of transmission from twenty-five percent to eight percent, the Court noted that a substantial limit existed in either case.³³⁴

Cases in the lower courts have raised the question more pointedly, however, and judicial interpretation is divided. While legislative history³³⁵ and interpretative guidance from the Department of Justice³³⁶ and EEOC³³⁷ indicate that the availability of mitigating treatments should not count in the evaluation of the "substantial limitation" element, some courts have refused to follow this guidance.³³⁸ The Tenth Circuit, for example, held in *Sutton v. United Airlines*³³⁹ that this portion of the interpretive guidance "is in direct conflict with the plain language of the ADA. . . . In making disability determinations, we are concerned with whether the impairment affects the individual in fact, not whether it would hypothetically affect the individual without the use of corrective

331. See *id.* at *3.

332. See *id.* *4.

333. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2206 (1998).

334. See *id.*

335. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("Whether a person has a disability should be assessed without regard to the availability of mitigating measures . . .").

336. See 28 C.F.R. pt. 35, app. A § 35.104 (1998); *id.* pt. 36, app. B. § 36.104 (1998).

337. See 29 C.F.R. pt. 1630, app. § 1630.2(h) (1998).

338. Courts, of course, are not bound to follow interpretive rules, which do not have the force of law. See Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and Courts?*, 7 YALE J. ON REG. 1, 55-58 (1990) (noting that courts should not presumptively follow agency guidelines and interpretive rules).

339. 130 F.3d 893 (10th Cir. 1997).

measures."³⁴⁰ The *Sutton* case concerned twin sisters who had been denied jobs as pilots with United because of their uncorrected visual impairment of 20/200 vision in their right eyes and 20/400 vision in their left eyes.³⁴¹ With glasses, both plaintiffs had 20/20 vision.³⁴² The Tenth Circuit affirmed summary judgment for United, reading the words "substantially limits" very literally and determining that the plaintiffs were not substantially limited in their ability to see:

Plaintiffs cannot have it both ways. They are either disabled because their uncorrected vision substantially restricts their major [life] activity of seeing and, thus, they are not qualified individuals for a pilot position with United, or they are qualified for the position because their vision is correctable and does not substantially limit their major life activity of seeing.³⁴³

This interpretation creates, as one commentator has observed, a catch-22 situation for plaintiffs.³⁴⁴ In order to prevail, plaintiffs must prove not only a substantial limitation but also must prove that they are qualified for the job opportunities or services that defendants have denied them. Thus, even a severely disabled plaintiff who can perform a job exceptionally well with reasonable accommodations may have no recourse if an employer refuses to hire her because of her disability. Under the Tenth Circuit's view, the accommodations may prevent her from being "disabled" and would therefore prevent the court from ever reaching the issue of whether the employer's rejection of the plaintiff made sense. Unfortunately, one other circuit court has noted that it will follow the Tenth Circuit's reasoning, at least in cases involving less severe impairments. The Fifth Circuit has stated that it will read narrowly the EEOC guidelines regarding mitigating measures and will consider mitigating measures in its disability analysis, except in cases involving "serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and the legislative history—diabetes, epilepsy, and hearing impairments."³⁴⁵ Other circuit courts, however, have held expressly that an evaluation of substantial limitations must not take

340. *Id.* at 902.

341. *See id.* at 895.

342. *See id.*

343. *Id.* at 903.

344. *See* Burgdorf, *supra* note 44, at 448; *see also* *Employers Win*, *supra* note 8, at 405 (attributing the low victory rate (14%) of plaintiffs in administrative and judicial ADA matters to the catch-22 situation inherent in the statute).

345. *Washington v. HCA Health Servs.*, 152 F.3d 464, 470 (5th Cir. 1998).

mitigating measures into account.³⁴⁶

The U.S. District Court for the Western District of Wisconsin has developed a particularly unusual approach to this issue. In *Happy Time Day Care Center*, the court decided to disregard "the alphabet soup of medication responsible for stabilizing [the plaintiff's] T cell count."³⁴⁷ This determination was in contrast to its decision in an earlier case, in which it had considered the effects of insulin in reducing limitations posed by the plaintiff's diabetes.³⁴⁸ The *Happy Time Day Care Center* court reconciled its decision with the earlier case by noting that "[u]nlike diabetes and insulin, the medication available to [the plaintiff] and others infected by HIV has no proven long term effectiveness and may become useless if a resistant form of the virus develops."³⁴⁹ This sliding scale approach is creative but still does not alleviate the catch-22 situation in cases in which effective medication is available. In fact, as HIV research becomes more promising, it is possible that the sliding scale approach will begin to take antiviral medication into account, thus prohibiting many HIV-infected plaintiffs from bringing suit even if HIV-based discrimination continues. This result would be particularly unfortunate given that prejudices and misconceptions regarding HIV may well prove to be more stubborn than the virus itself.

In the end, any consideration of mitigating measures in the evaluation of substantial limitations thwarts the purposes of the ADA. The impairment-based discrimination that the ADA seeks to prohibit can occur even when mitigating measures are in place, as when an employer, relying unreasonably on myths and stereotypes, denies a job opportunity to a person with diabetes whose disease is controlled through insulin. Sometimes the mitigating measures themselves may generate fear and discrimination, as when a person who uses a prosthetic device is denied an opportunity because others fear it or find it unsightly. If a court finds that insulin or a prosthetic device alleviates functional limitations and renders such plaintiffs not

346. See, e.g., *Bartlett v. New York State Bd. of Law Exam'rs*, 156 F.3d 321, 329 (2d Cir. 1998); *Baert v. Euclid Beverage Ltd.*, 149 F.3d 626, 629 (7th Cir. 1998); *Arnold v. United Parcel Serv.*, 136 F.3d 854, 866 (1st Cir. 1998); *Matczak v. Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998); *Harris v. H & W Contracting Co.*, 102 F.3d 516, 520-21 (11th Cir. 1996); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997).

347. *United States v. Happy Time Day Care Ctr.*, 6 F. Supp. 2d 1073, 1081 (W.D. Wis. 1998).

348. See *Schluter v. Indus. Coils, Inc.*, 928 F. Supp. 1437, 1445 (W.D. Wis. 1996).

349. *Happy Time Day Care Ctr.*, 6 F. Supp. 2d at 1081.

disabled, then these plaintiffs will never have a chance to present arguments as to the defendants' unreasonable, discriminatory conduct—the precise harm that the ADA was meant to prohibit.

(4) *When Must Impairments Be "Substantially Limiting"?*

One final issue regarding the substantial limitation element left open by *Bragdon* concerns the time frame in which such limitations are in effect. While the majority in *Bragdon* held that the plaintiff was disabled due to her current risk of transmitting her disease to a sexual partner or an unborn child,³⁵⁰ it is unclear whether the same analysis would apply in the case of an HIV-infected child who may run these risks at some unspecified time in the future. Chief Justice Rehnquist placed significance on the fact that the words "substantially limits," as they appear in the ADA's disability definition, are in the present tense.³⁵¹ This view is consistent with lower court opinions holding that plaintiffs suffering from terminal diseases are not disabled unless the disease presently limits a major life activity.³⁵² In one such case, the U.S. District Court for the Northern District of Illinois, analyzing the substantial limitation element under the "regarded as" prong of the definition, rejected the plaintiff's contention that her husband's employer regarded him as disabled because it knew of his cancer, which did not substantially limit him at the time.³⁵³ According to the court, "such reasoning would lead to the conclusion that any employee who informed his employer that he suffered from a life-threatening or terminal disease would become 'disabled' for purposes of the ADA."³⁵⁴ The court therefore required the plaintiff to "produce evidence that the employer viewed the employee as someone who had a disability that seriously limited his ability to work."³⁵⁵ After reviewing this analysis, one has to wonder who can qualify as disabled if those who suffer from life-threatening, and even terminal, diseases do not.

350. See *supra* notes 283-86 and accompanying text.

351. See *supra* note 296 and accompanying text.

352. See, e.g., *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192 (5th Cir. 1996) (ruling that plaintiff with breast cancer was not disabled where she was able to work); *Ennis v. National Ass'n of Bus. & Educ. Radio*, 53 F.3d 55, 59-60 (4th Cir. 1995) (finding that evidence would have to show that child with HIV currently was limited in a major life activity in order for him to be deemed disabled); *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977, 981 (N.D. Ill. 1997) (holding that the plaintiff's husband, who had non-Hodgkins lymphoma, "a serious and ultimately terminal form of cancer," was not disabled at the time of his termination because he was able to work despite his disease).

353. See *Hirsch*, 989 F. Supp. at 982.

354. *Id.*

355. *Id.*

Some courts, however, have factored future limitations into their analyses of the substantial limitation element. In *Lee v. Trustees of Dartmouth College*,³⁵⁶ the plaintiff was terminated from a medical residency program in neurosurgery when the defendants learned that he suffered neurological symptoms that may have been consistent with the onset of multiple sclerosis, a degenerative neurological disease.³⁵⁷ While no evidence indicated that the symptoms substantially limited the plaintiff at the time of his termination, the court held that the plaintiff had raised a factual issue as to whether he was disabled under the "regarded as" prong of the definition.³⁵⁸ The court reasoned that because the evidence indicated that the defendants regarded the plaintiff as having multiple sclerosis, "a trier of fact could find that defendants perceived [the plaintiff's] neurological symptoms as substantially limiting (or *potentially* limiting) his ability to learn . . . and/or to perform the necessary manual tasks needed in surgery."³⁵⁹ The court also noted that the defendants feared that the plaintiff "would deteriorate and be unable to complete the [residency] program."³⁶⁰

This analysis correctly accounts for the harm caused by myths and fears regarding disabilities and their possible future effects. However, it does finesse the literal language of the definition, which describes substantial limitations in the present tense. As noted previously,³⁶¹ some courts are less comfortable departing from rigid readings of the statutory language. Therefore, as long as the statutory text remains unchanged, defendants in some jurisdictions will be able to discriminate with impunity against people whose diseases do not pose present restrictions but do pose serious threats of future harm.

356. 958 F. Supp. 37 (D.N.H. 1997).

357. *See id.* at 39 & n.2.

358. *See id.* at 43.

359. *Id.* (emphasis added).

360. *Id.*

361. *See supra* notes 338-46 and accompanying text. Chief Justice Rehnquist described a slippery slope that courts create when they decide to take future limitations into account: "Respondent's argument, taken to its logical extreme, would render every individual with a genetic marker for some debilitating disease 'disabled' here and now because of some possible future effects." *Bragdon v. Abbott*, 118 S. Ct. 2196, 2216 (1998) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *see also* Mark S. Dichter & Sarah E. Sutor, *The New Genetic Age: Do Our Genes Make Us Disabled Individuals Under the Americans with Disabilities Act?*, 42 VILL. L. REV. 613, 633 (1997) (recommending that courts not expand the ADA disability definition to cover people with genetic markers for particular diseases because they may never get these diseases and because other state and federal legislation already protects against discrimination based on genetic information).

3. Judicial Interpretation of the "Record of" and "Regarded as" Prongs

The "record of such an impairment" element of the ADA's disability definition,³⁶² which appears as the second prong of the three-prong test, is the least litigated of the three.³⁶³ It comes into play only when a plaintiff is unable to prove a real or perceived current substantial limitation.³⁶⁴ When plaintiffs do rely on this prong, they run up against the same hurdles inherent in the first prong because the words "such an impairment" refer to an impairment that substantially limits a major life activity, as described in the first prong.³⁶⁵ Therefore, under the "record of" prong, the recorded impairment must have substantially limited a major life activity at some time in the past, even if it no longer does so.³⁶⁶ When courts take mitigating treatments into account during their analyses of the substantial limitation element, even plaintiffs who have experienced serious impairments may fail to satisfy the "record of" prong. Thus, in *Ellison v. Software Spectrum, Inc.*,³⁶⁷ a plaintiff who had had a lumpectomy and daily radiation treatments for six weeks to treat breast cancer could not show a record of an impairment that substantially limited a major life activity because she had continued to work on a modified schedule throughout her treatment, and because her treatment eventually allowed her to recover completely.³⁶⁸

362. 42 U.S.C. § 12102(2)(B) (1994).

363. My own research for this Article turned up far fewer cases under this prong than under the other two prongs of the definition.

364. See, e.g., *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 510 (7th Cir. 1998) (holding that the plaintiff's evidence regarding limitations that her attention deficit disorder had posed during her school days had raised a factual issue as to whether she had a record of disability, even though the disorder did not presently limit her in her work, and her employer did not regard her as presently limited).

365. See 42 U.S.C. § 12102(2)(A).

366. See 29 C.F.R. § 1630.2(k) (1998) ("Has a record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."); 28 C.F.R. §§ 35.104(1)(iii)(3), 36.104(1)(iv)(3) (1998) (same).

367. 85 F.3d 187 (5th Cir. 1996).

368. See *id.* at 192. This interpretation follows legislative intent insofar as it requires recorded impairments to have been substantially limiting. See H.R. REP. NO. 101-485, pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 (stating that the "record of" prong covers "individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity"). It is doubtful, however, that Congress intended courts to factor in specific mitigating treatments when assessing

The "regarded as" prong of the disability definition has posed more complex interpretative questions to the courts. A key issue is whether a plaintiff with a real impairment literally must be regarded as substantially limited in a major life activity or whether she need merely be subjected to one episode of prejudice based on the impairment in order to qualify under the "regarded as" prong. The ADA regulations state that someone can qualify as "disabled" under this prong if the person is impaired and the impairment is perceived as substantially limiting, or if the impairment is actually substantially limiting, but only as a result of the attitudes of others toward the impairment.³⁶⁹ One commentator has noted that the second interpretation strains the statutory language, which speaks in terms of direct causation between the impairment and the limitation, even with respect to the "regarded as" prong.³⁷⁰ Another commentator has suggested that this interpretation, if read literally, adds nothing to the "actual disability" prong of the definition because an impairment that causes substantial limitations due to societal attitudes is still a substantially limiting impairment that should qualify under the first prong.³⁷¹ Nevertheless, however broadly or narrowly one reads the statutory "regarded as" prong, this interpretation—the so-called "attitudinal" regulation³⁷²—is presumably a valid construction of the statute.³⁷³

Under a literal reading of the two regulatory interpretations, a plaintiff runs into the same problems proving substantial limitations

past limitations. See *supra* note 335; see also S. REP. NO. 93-1297, at 38-39 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6389 (noting that the "record of" prong in the Rehabilitation Act covers "persons who have recovered—in whole or in part—from a handicapping condition, such as . . . cancer"); 29 C.F.R. pt. 1630, app. § 1630.2(k) (noting that the "record of" prong of the ADA "protects former cancer patients from discrimination based on their prior medical history"). The use of the conditional in the EEOC's Interpretative Guidance on this point is instructive: "The impairment indicated in the record must be an impairment that *would* substantially limit one or more of the individual's major life activities." *Id.* (emphasis added).

369. See 28 C.F.R. §§ 35.104, 36.104; 29 C.F.R. § 1630.2(l)(1)-(2). This language is taken from the legislative history of the ADA. See H.R. REP. NO. 101-485, pt. 2, at 53, reprinted in 1990 U.S.C.C.A.N. at 335. The regulations also state that a plaintiff can qualify as disabled under the "regarded as" prong if she has no impairment at all but is treated as if she had a substantially limiting impairment. See 28 C.F.R. §§ 35.104, 36.104; 29 C.F.R. § 1630.2(l)(3).

370. See Buss, *supra* note 167, at 1431.

371. See Arlene B. Mayerson, *Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent*, 42 VILL. L. REV. 587, 597 (1997).

372. See Buss, *supra* note 167, at 1431 (describing an identically worded regulation under the Rehabilitation Act, 34 C.F.R. § 104.3(j)(2)(iv)(B) (1991)).

373. See *supra* note 165.

as he would under the first prong of the definition.³⁷⁴ When the alleged major life activity is working, such a showing can be particularly difficult, given the broad-based lack of employability that the plaintiff must demonstrate.³⁷⁵ An early Fourth Circuit case decided under identical language in the Rehabilitation Act, *Forrisi v. Bowen*,³⁷⁶ illustrates this difficulty. In *Forrisi*, a utility systems repairer was fired because his employer claimed that his acrophobia (fear of heights) rendered him unable to climb ladders, a necessary part of the job.³⁷⁷ Although the plaintiff argued that he had been regarded as disabled under the third prong of the disability definition, the court disagreed, holding that the employer had not perceived him as substantially limited in working but only as "unsuited for one position in one plant—and nothing more."³⁷⁸ Because the Fourth Circuit affirmed summary judgment for the employer, the plaintiff never had the opportunity to present evidence regarding the possibility of the employer making specific "adjustments to accommodate his fears."³⁷⁹ At least four other circuits have placed the same burden on plaintiffs who raised the issue of substantial limitations in working under the "regarded as" prong of the ADA.³⁸⁰

The narrow reading of this statutory prong and its two regulatory interpretations discussed above can lead to egregious results. In *Ellison*, for example, the plaintiff's "regarded as" argument was based upon several comments that her employer made concerning her breast cancer and lumpectomy.³⁸¹ During a meeting in which supervisors discussed a departmental staff reduction, a human resources official asked whether any employees had special circumstances to be considered.³⁸² The plaintiff's supervisor

374. See 29 C.F.R. § 1630.2(j) (defining "substantially limits" as "[u]nable to perform a major life activity that the average person in the general population can perform" or "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular life activity"); see also *supra* notes 299-361 and accompanying text (illustrating the difficulty courts have had in applying the regulatory interpretations of "substantially limits").

375. See *supra* note 263 and accompanying text.

376. 794 F.2d 931 (4th Cir. 1986).

377. See *id.* at 933.

378. *Id.* at 935.

379. *Id.* at 931.

380. See, e.g., *Gordon v. Hamm*, 100 F.3d 907, 913 (11th Cir. 1996); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1445 (10th Cir. 1996); *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 (5th Cir. 1995).

381. See *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192-93 (5th Cir. 1996).

382. See *id.* at 193.

responded that "Phyllis [the plaintiff] has cancer."³⁸³ Shortly thereafter, the plaintiff and three of her thirty-four departmental colleagues were informed that they had thirty days to find other positions in the company or leave.³⁸⁴ Nevertheless, the Fifth Circuit did not determine this evidence to be sufficient to defeat summary judgment for the employer because the plaintiff, as the highest ranked of the four affected employees, was offered and accepted a lower paying position within the company when an opening occurred.³⁸⁵

In addition, the court held that a series of derogatory comments made by the plaintiff's supervisor did not raise a factual issue as to her qualification under the "regarded as" prong.³⁸⁶ These comments included his suggestion that the plaintiff have a mastectomy rather than a lumpectomy because her breasts were not worth saving, his remark that her nausea following radiation therapy had not affected her weight, and his joking suggestion that employees evacuating the building during a power outage follow the plaintiff because she glowed.³⁸⁷ While the court condemned these comments as "beneath contempt," it held that they failed to create an issue of material fact as to "whether [the employer] regarded Ellison as having a substantially limiting impairment,"³⁸⁸ primarily because the comments failed to indicate that the employer believed that the plaintiff's impairment "foreclose[d] generally the type of employment involved."³⁸⁹

Similar prejudicial sentiment by an employer is evident in a case described by Arlene Mayerson in which she represented a man who wore a hearing aid.³⁹⁰ The defendant "freely admitted that the reason the plaintiff was not hired was because he wore a hearing aid."³⁹¹ Nevertheless, the court dismissed the case on summary judgment, apparently finding that the hearing aid prevented the plaintiff from being actually limited under the first prong of the disability

383. *Id.*

384. *See id.* at 189.

385. *See id.* at 193.

386. *See id.* at 192-93.

387. *See id.* The first comment is based upon prejudices involving both sex and disability. For an insightful discussion of the nexus between sex discrimination and disability discrimination, see generally Elizabeth R. OuYang, *Women with Disabilities in the Work Force: Outlook for the 1990's*, 13 HARV. WOMEN'S L.J. 13 (1990).

388. *Ellison*, 85 F.3d. at 193.

389. *Id.* at 192.

390. *See Mayerson, supra* note 371, at 592-93.

391. *Id.* at 593.

definition, and also finding that the defendant did not regard the plaintiff as being actually substantially limited under the third prong.³⁹² In addition, the court must have found that the plaintiff's rejection from one job, as a result of an employer's negative attitude toward his hearing aid, did not substantially limit him in working.³⁹³

It is doubtful that Congress intended such results, despite their conformity to the rigid language of the "regarded as" prong. Legislative history regarding the ADA clearly states that a plaintiff qualifies for coverage under the "regarded as" test if the person "is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, [because] a perceived concern about employing persons with disabilities could be inferred."³⁹⁴ The legislative history also specifies that "[a] person who is excluded from any basic life activity, *or is otherwise discriminated against*, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability,"³⁹⁵ and that a person who is rejected from a job due to myths, fears, and stereotypes regarding disabilities is covered by the "regarded as" prong "whether or not the employer's perception was shared by others in the field."³⁹⁶ These standards would certainly lead to a different result in the hearing aid case, as well as in *Ellison* and other cases dismissed on summary judgment before plaintiffs had an opportunity to present evidence regarding their employers' motivations. Instead, these cases have held that analysis of motivations is foreclosed unless the defendant's negative attitude is so prevalent throughout society that it actually

392. See *id.* at 592-93. For a critical discussion of opinions that take account of mitigating measures such as hearing aids when evaluating the substantial limitation element, see *supra* notes 333-49 and accompanying text.

393. For a list of cases holding that rejection from one job does not constitute a substantial limitation in working, see *supra* note 323.

394. H.R. REP. NO. 101-485, pt. 3, at 30-31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453; see also 28 C.F.R. pt. 35, app. A § 35.104 (1998) (noting that if a public entity refuses admittance to someone because of an impairment and can articulate no legitimate reason for doing so, the person would qualify under the "regarded as" prong); *id.* pt. 36, app. B. § 36.104 (1998) (noting that if a public accommodation refuses service to someone because of an impairment and can articulate no legitimate reason for doing so, the person would qualify under the regarded as prong).

395. H.R. REP. NO. 101-485, pt. 2, at 53, *reprinted in* 1990 U.S.C.C.A.N. 303, 335 (emphasis added); see also S. REP. NO. 101-116, at 24 (1989) ("A person who is excluded from any activity covered under this Act or is otherwise discriminated against because of a covered entity's negative attitude toward disability is being treated as having a disability which affects a major life activity.").

396. H.R. REP. NO. 101-485, pt. 3, at 30, *reprinted in* 1990 U.S.C.C.A.N. at 453.

constitutes a substantial limitation to the plaintiff,³⁹⁷ or if the defendant believes that the attitude is so prevalent as to constitute a substantial limitation.³⁹⁸

When viewed in isolation, illustrations of the "regarded as" prong found in the legislative history give some support to these holdings. For example, in describing individuals considered to be "regarded as" disabled, a House Report speaks of persons with scars from severe burns who may be "viewed by others as having an impairment which substantially limits some major life activity (e.g., working or eating in a restaurant) and are discriminated against on that basis."³⁹⁹ The illustration does not address whether one incident of discrimination against such persons, based simply on negative reactions to the scars, would qualify them as disabled under the "regarded as" prong. Similarly, a second example speaks of an employer refusing to hire someone "because of a fear of the 'negative reactions' of others to the individual."⁴⁰⁰ Again, the example stops short of explaining whether the employer's own negative reaction is enough to make the rejected employee "regarded as" disabled. Further, the same report cites *School Board v. Arline*,⁴⁰¹ *Doe v. Centinela Hospital*,⁴⁰² and *Thornhill v. Marsh*,⁴⁰³ three Rehabilitation Act cases, as illustrating proper applications of the "regarded as" prong.⁴⁰⁴ None of these cases concerned a simple negative reaction to an impairment, however. The *Arline* plaintiff was held to be disabled

397. This scenario would fulfill the regulatory requirement that the impairment be substantially limiting as the result of the attitudes of others. See 28 C.F.R. §§ 35.104, 36.104; 29 C.F.R. § 1630.2(l)(2) (1998). Ironically, this requirement means that a plaintiff has no recourse against a defendant whose decision criteria are unusually prejudicial.

398. This situation would fulfill the requirement that the defendant believe the impairment to be substantially limiting. See 28 C.F.R. §§ 35.104, 36.104; 29 C.F.R. § 1630.2(l)(1).

399. H.R. REP. NO. 101-485, pt. 2, at 53, reprinted in 1990 U.S.C.C.A.N. at 335.

400. *Id.*

401. 480 U.S. 273, 284 (1986) (holding that by including persons "who are actually physically impaired" and persons "who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment").

402. No. CV87-2514 PAR (PX), 1988 WL 81776, at *1, *6-7 (C.D. Cal. June 30, 1988) (holding that where the defendant excluded the plaintiff from one rehabilitation program due to the plaintiff's HIV-positive status, the defendant had treated the plaintiff's impairment as substantially limiting a major life activity, and the plaintiff therefore had been "regarded as" disabled).

403. 866 F.2d 1182, 1184 (9th Cir. 1989) (holding that a factual issue as to the plaintiff's disability status existed when the defendant believed that the plaintiff was substantially limited in lifting due to a congenital spinal abnormality).

404. See H.R. REP. NO. 101-485, pt. 2, at 53-54, reprinted in 1990 U.S.C.C.A.N. at 336.

because her previous hospitalization for tuberculosis created a record of an impairment that had substantially limited her major life activities, in accordance with the second prong of the disability definition.⁴⁰⁵ When discussing the "regarded as" prong in *Arline*, Justice Brennan never directly addressed whether a single negative reaction to an impairment could qualify a plaintiff as disabled.⁴⁰⁶ Further, the courts in both *Centinela* and *Thornhill* noted that both plaintiffs had been specifically regarded as substantially limited in major life activities, although both courts interpreted the substantial limitation element somewhat broadly.⁴⁰⁷ Thus, neither case dealt with the ramifications of a single negative reaction.

The EEOC regulations and interpretative guidance, perhaps based upon these illustrations, do not allow for the qualification of a plaintiff under the "regarded as" prong based upon a single negative reaction.⁴⁰⁸ The EEOC Interpretive Guidance states that if a plaintiff can show that an employer made a decision because of "a perception of *disability* based on 'myth, fear or stereotype,' the individual will satisfy the 'regarded as' part of the definition of disability."⁴⁰⁹ The first use of the word "disability" in this quotation implies that the employer must not merely react negatively to the impairment but must perceive it as a disability—that is, an impairment substantially limiting a major life activity. While this interpretation squares with the illustrations described in the ADA's legislative history and with the literal wording of the statutory "regarded as" prong, it seems at cross purposes with the broader protections intended to be offered by the ADA⁴¹⁰ and with other language in the legislative history that discusses negative reactions more directly.⁴¹¹

Further, an interpretation that does not allow recourse to those

405. See *Arline*, 480 U.S. at 281.

406. See *id.* at 284. Justice Brennan's opinion speaks only in terms of "those who are regarded as impaired and who, as a result, are substantially limited in a major life activity." *Id.*

407. See *Thornhill*, 866 F.2d at 1184 (deciding that a factual issue existed as to whether the defendant had regarded the plaintiff's spinal abnormality as substantially limiting the plaintiff in lifting where the defendant's physician had reported that the plaintiff should not lift more than 25 to 50 pounds); *Centinela*, 1988 WL 81776, at *7 (deciding that the plaintiff, who was completely excluded from one rehabilitation program due to his HIV, had been regarded as substantially limited in learning because the defendant had produced no evidence that other treatment programs would not disfavor the plaintiff on the same basis).

408. See 29 C.F.R. pt. 1630, app. § 1630.2(l) (1998).

409. *Id.* (emphasis added).

410. See *supra* notes 11-13 and accompanying text.

411. See *supra* notes 394-96 and accompanying text.

who have been refused opportunities on the basis of their mental and physical impairments does not make sense. If the goal of the ADA is to allow those who are qualified to participate in society by working and using public accommodations and programs, there is no reason to let a single defendant prevent such participation because of his personal negative reaction to a plaintiff's impairment—an impairment that may not prevent the plaintiff from being qualified to participate at all. If a single episode of discrimination were held sufficient to qualify a plaintiff as disabled, *Bragdon* would have been the easy case it should have been from the beginning. The district court could have sped nimbly through the issue of the plaintiff's disabled status and focused immediately on the real issue: whether the defendant had a legitimate reason to treat the HIV-infected plaintiff differently from other plaintiffs because her HIV posed a direct threat. Because the "regarded as" prong has been interpreted so narrowly, however, its application to the *Bragdon* facts was doubtful, and the district court therefore based its reasoning on a much more complex analysis under the first definitional prong. This hurdle added years to Sidney Abbott's suit, and, in the end, the Supreme Court's opinion has done little to speed future cases raising similar issues unless they also involve substantial limitations on the major life activity of reproduction in adults.⁴¹²

The theory allowing a single negative reaction to qualify a plaintiff as disabled under the "regarded as" prong has one fatal flaw. It contradicts the literal language of the statute,⁴¹³ even though it appears to coincide with legislative intent. Therefore, it is likely that the courts will continue to reject this interpretation of the prong based on the plain language of the ADA and continue on their unwieldy, often inequitable courses.

IV. COMING TO TERMS WITH UNWORKABLE STATUTORY LANGUAGE: HOW THE ADA'S DISABILITY DEFINITION MUST BE CHANGED

Courts are dismissing valid disability discrimination cases because plaintiffs often are unable to prove their disabled status in accordance with the tortured language of the ADA's definition of

412. The *Bragdon* decision will clearly help infertile adults establish their infertility as a disability. Its usefulness to those with other impairments, however, is questionable, given that the decision turns on only one major life activity. Even its application to HIV-positive children, or those with HIV who are past menopause, is questionable. See *supra* notes 265-78 and accompanying text.

413. See *supra* notes 159-62 and accompanying text.

disability.⁴¹⁴ These dismissals are inconsistent with the congressional policy behind the definition.⁴¹⁵ Further, they are inconsistent with the theories from the disability rights movement that underlie the entire ADA.⁴¹⁶ The most important of these theories is that disability is socially constructed.⁴¹⁷ Disability stems not from a person's fulfillment of some objective criteria but instead from actions and reactions on the part of others. Therefore, a disability discrimination case should properly focus on the defendant's conduct toward the plaintiff rather than the plaintiff's "objective" status as a person with a disability. The ADA recognizes the relativity of disability to some extent by mandating an individualized inquiry in each case as to the disability issue.⁴¹⁸ However, it still puts the burden on the plaintiff to prove her status, when the real issue concerns the motives behind the defendant's actions. In addition, the rigid language that the ADA uses to describe disabled status undercuts the individualized nature of any inquiry. It is impossible to measure the "substantiality" of limitations in "major life activities" when what human beings must do, and how they must do it, is relative.⁴¹⁹

Several commentators have noted serious inequities resulting from courts' handling of the disability issue and have called for a variety of solutions.⁴²⁰ One proposal involves eliminating "working" as a major life activity,⁴²¹ because people who may indeed be substantially limited in their ability to perform discrete tasks are rarely able to prove broad-based limits in employability, as the ADA regulations⁴²² and many courts⁴²³ have required. Another proposal calls for a broadened interpretation of the words "substantially limits" when assessing disability under the "regarded as" prong, particularly when the major life activity at issue is working.⁴²⁴ Finally,

414. See *supra* notes 247-52, 255-56, 302-11, 317-23, 327-32, 339-43, 353-55, 367-68, and 380-93 and accompanying text.

415. See *supra* note 173 and accompanying text.

416. See *supra* notes 44-46 and accompanying text.

417. See *supra* notes 18-21 and accompanying text.

418. The ADA says that disability is to be defined "with respect to an individual." 42 U.S.C. § 12102(2) (1994); see also 29 C.F.R. pt. 1630, app. § 1630.2(j) (1998) ("The determination of whether an individual has a disability is [based] . . . on the effect of that impairment on the life of the individual. Some impairments may be disabling for particular individuals but not for others . . .").

419. See *supra* note 19 and accompanying text.

420. See *infra* notes 421-25 and accompanying text.

421. See Locke, *supra* note 260, at 135-46.

422. See 29 C.F.R. § 1630.2(j)(3).

423. See *supra* notes 315-26 and accompanying text.

424. See Mayerson, *supra* note 371, at 609-12.

a third proposal calls for changes in judicial interpretation of the definition as it applies to a number of discrete issues, including substantial limitations in working, temporary disabilities, judicial estoppel in cases in which plaintiffs have pursued disability benefits, and the status of former employees.⁴²⁵

Each of these proposals has its limits, however. The first proposal, which calls for the exclusion of working as a major life activity, would simply limit the number of ways in which a plaintiff may attempt to prove the disability element of her *prima facie* case. If a plaintiff cannot build an argument upon limitations in working, she would have to substitute some other major life activity that already is available. Given the way in which the *Bragdon* Court recently has defined the word "major" as used in the ADA,⁴²⁶ it is unlikely that courts or agencies will add discrete, lower-level tasks (such as typing or climbing a ladder) to the list of recognized major life activities any time soon.

The second proposal also has its problems insofar as it suggests using a broader interpretation of the "substantially limits" element when assessing the "regarded as" prong than when assessing the first "actual disability" prong.⁴²⁷ While this proposal does appear to reflect legislative intent and lead to equitable results,⁴²⁸ it is inconsistent with current statutory and regulatory language, which gives no indication that limitations should be measured differently under the different prongs of the definition. Finally, the third proposal, although it similarly may coincide with the broader purposes of the ADA, arguably does not always coincide with specific legislative intent and the literal statutory language⁴²⁹ and

425. See Burgdorf, *supra* note 11, at 572-84.

426. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2205 (1998).

427. See Mayerson, *supra* note 371, at 609-12.

428. See *supra* notes 394-96 and accompanying text.

429. Arguably, the coverage of temporary disabilities would contravene the express intent of Congress not to include "a minor, trivial impairment, such as a simple infected finger" within the scope of the ADA. H.R. REP. NO. 101-485, pt. 2, at 52 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 334; *see also* S. REP. NO. 101-116, at 23 (1989) (stating that "minor, trivial impairments" are not covered). *But see* Burgdorf, *supra* note 11, at 475-76 (arguing that this language from the legislative history refers to the severity, and not the duration, of covered impairments). In addition, the expansion of the notion of being "substantially limited in working" appears to cut against Congress's specification, under the first prong, that "a person who is limited in his or her ability to perform only a particular job, because of circumstances unique to that job site or the materials used, may not be substantially limited in the major life activity of working." H.R. REP. NO. 101-485, pt. 3, at 29, *reprinted in* 1990 U.S.C.C.A.N. 445, 451. Under the third "regarded as" prong, allowing plaintiffs to qualify as disabled because they have been denied opportunities based on myths, fears, or stereotypes regarding their impairments would contravene the

does not necessarily address the problems of those who seek to prove disability by relying on activities other than working.⁴³⁰

Given that the literal language of the ADA's disability definition does not always reflect Congressional intent and, indeed, often thwarts the policies underlying the ADA as a whole, changes on a larger scale than those described in the previous proposals are necessary to bring the definitional language in line with the Act's real purposes. The statutory definition, which speaks stiltedly in terms of substantial limitations on major life activities, is simply unworkable. Defendants who have denied opportunities to people because of myths, irrational fears, or stereotypes surrounding mental and physical impairments can easily slip through the Act's linguistic loopholes, emerging unscathed after a summary dismissal. It appears that Congress did not intend such results, despite the language it employed in the disability definition.⁴³¹

Recommendations that courts ignore the strict statutory language in favor of implied legislative intent, however, contradict accepted theories of statutory construction⁴³² and will therefore not likely meet with judicial approval. Courts finding plain meaning in the terms "major," "substantially limits," and "such an impairment" will not reject such meaning in favor of contradictory interpretations evident in legislative history unless the evidence of such

literal statutory language unless those myths, fears, and stereotypes consisted of mistaken beliefs that the plaintiff was substantially limited in some major life activity. *See* 42 U.S.C. § 12102(2)(C) (1994) (requiring that a plaintiff be regarded as having an impairment that limits a major life activity, rather than merely being subjected to ill treatment based on general misperceptions regarding his or her impairment).

430. A rule holding that exclusion from one job makes one "regarded as substantially limited in the major life activity of working" would allow plaintiffs who have suffered occupational discrimination to avoid summary dismissal and get to the heart of their cases. However, it would do little to help other plaintiffs, who must rely on perceived or actual limitations in other activities to prove the "disability" element of their *prima facie* cases. Because of narrow judicial and regulatory interpretations of the "substantially limits" element, such plaintiffs face considerable difficulty in keeping their cases alive. *See supra* notes 299-361 and accompanying text. In addition, even if Congress intended "substantial" limits in working under the first definitional prong to mean more than exclusion from a single job, it is hard to justify a different interpretation under the third "regarded as" prong when the statutory language itself does not draw such a distinction. *See supra* notes 162-64 and accompanying text.

431. *See supra* notes 394-96 and accompanying text.

432. *See, e.g.,* *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here . . . the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' " (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917))); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947) ("While courts are no longer confined to the [statutory] language, they are still confined by it.").

contradictory interpretations is clear and convincing.⁴³³ In the case of the ADA's disability definition, the legislative history contains evidence that Congress's intent did not necessarily coincide with the statutory language it drafted,⁴³⁴ but this evidence has not been sufficiently strong to convince the more literalist courts to depart from perceived plain meaning.⁴³⁵

Richard Posner has theorized that statutory language should be interpreted as commands from legislatures to courts and that the proper way to interpret such commands is to ascertain what the legislature was intending to communicate, even if the communication itself is garbled.⁴³⁶ He presents an example of an instance in which the intent behind a command is unintentionally contradicted by the careless language used to communicate it:

Suppose I ask my secretary to call Z and tell him I must cancel our lunch date today—I have been called out of town suddenly. The secretary notices that on my calendar I have marked lunch with Y, not Z, but it is too late to check back with me, because I have left the office and cannot be reached. Is it not plain that the secretary should call Y, even though there was no semantic or internal ambiguity in my instruction?⁴³⁷

Unfortunately, in the case of the ADA's disability definition, the discrepancy between the legislative intent and the language employed is not nearly so neatly discernible. Therefore, unless the language of the definition itself is changed, courts will have no reason to change their literalist applications of the statutory text.

A few key changes to the ADA's statutory definition of disability are necessary to prevent the current tangled language of the

433. See *Ron Pair Enters.*, 489 U.S. at 242 ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" (emphasis added) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982))).

434. See *supra* notes 335 and 394-96 and accompanying text.

435. For examples of judicial opinions rejecting implied legislative intent in favor of the narrower statutory language, see *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 168 (4th Cir. 1997) (en banc) (stating that there was "no reason to resort to the legislative history to ascertain Congress's intent" because "the statutory meaning of 'impairment' is plain and unambiguous"); *Coghlan v. H.J. Heinz Co.*, 851 F. Supp. 808, 812 (N.D. Tex. 1994) (taking account of the effects of insulin in evaluating whether a person with diabetes was substantially limited, despite legislative intent to the contrary, because the plain meaning of the word "limits" rendered legislative history and congressional intent "inapplicable to the analysis").

436. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 265-68 (1990).

437. *Id.* at 268.

definition from undermining the broader purposes of the ADA. First, Titles I and II of the ADA must be amended so that they no longer speak in terms of a specific protected class.⁴³⁸ That is, rather than prohibiting discrimination against a "qualified individual with a disability,"⁴³⁹ these titles must prohibit discrimination "on the basis of disability." Such a change would shift the inquiry from the plaintiff's status to the defendant's motivation and would bring the ADA in line with other civil rights legislation prohibiting discrimination on the basis of race, sex, national origin, and religion.⁴⁴⁰

The elimination of the protected class structure, standing alone, will not allow the ADA to fulfill its purposes, however. Title III of the ADA is not framed in terms of a protected class of individuals with disabilities, yet its incorporation of the current statutory definition of "disability" gives rise to the same problems that plaintiffs encounter when attempting to prove disabled status under Titles I and II, as *Bragdon* amply demonstrates. Therefore, even if it no longer speaks in terms of a protected class of individuals with disabilities, the ADA must still define disability in a way that allows courts to assess whether discrimination on a prohibited basis occurred. The current definition, which relies on notions of "substantial limits" on "major life activities," has proved not only unworkable, but often harmful to the Act's purposes. It should be replaced with a definition based simply upon mental or physical impairment. Under such a definition, if a defendant bases a decision upon a plaintiff's actual mental or physical impairment—or a plaintiff's record of such an impairment, or a perceived impairment⁴⁴¹—and has no legitimate reason to do so, then the defendant is liable for disability discrimination.

Such a definition coincides with the reasons behind prohibiting disability discrimination in the first place. What makes such discrimination wrong is its reliance on irrational, unsubstantiated judgments about mental and physical impairments—judgments that

438. Title III, which governs public accommodations, does not speak in terms of a protected class. See 42 U.S.C. § 12812(a) (1994); *supra* note 113 (providing the express language of Title III).

439. See 42 U.S.C. § 12112 (a) (Title I); *id.* § 12132 (Title II).

440. See, e.g., *id.* § 2000d (1994) (prohibiting discrimination on the basis of race, color, and national origin in programs receiving federal assistance); *id.* § 2000e (prohibiting discrimination on the basis of race, sex, religion, and national origin in employment).

441. The "record of" and "regarded as" prongs should be maintained. The "record of" prong is necessary to guard against discrimination based upon irrational beliefs about past impairments, and the "regarded as" prong is necessary to guard against discrimination based upon irrational beliefs regarding perceived impairments.

deprive qualified people of the opportunity to participate in society. The wrongness of such discrimination does not depend upon how severe the impairments are or how the people with the impairments live their lives when they are not busy being subjected to discrimination. Instead, the wrongness stems from the decisionmakers' stereotyping and the vicious circle of isolation it causes.⁴⁴² Thus, a definition turning simply on impairment, rather than upon notions of substantial limitations in major life activities, will coincide with the overall purposes of the ADA in banning this type of discrimination.

One easily anticipated criticism of such a statutory amendment concerns charges of over-inclusiveness. Critics will claim that in failing to require plaintiffs to prove that their impairments substantially limit their major life activities, the amendment will open the floodgates to allow people with minor impairments to file claims of disability discrimination and will subject defendants to prolonged, baseless litigation. These fears, however, are unfounded for several reasons. First, the amendment does not open floodgates; instead, it merely assures that the normal channels of access to justice are as open to disability discrimination cases as they are to cases concerning race, sex, national origin, and religious discrimination, in which plaintiffs need not prove a special status in order to proceed with a suit.⁴⁴³ Second, any intention to limit the ADA's protections to the "truly disabled" is misplaced from the outset because "true disability" is a myth. Even the current ADA definition, through its "regarded as" prong, recognizes that disability can be in the eyes of the beholder.⁴⁴⁴ Finally, under the suggested amendment, defendants will not be subjected to prolonged, baseless suits. Even under the new impairment-based definition, defendants can still win summary dismissals if they can show a lack of evidence regarding a plaintiff's

442. The ADA itself, in its Findings and Purposes section, recognizes that "historically, society has tended to isolate and segregate individuals with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* § 12101(a)(2). The ADA also notes that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency." *Id.* § 12101(a)(8).

443. See *supra* note 110 and accompanying text.

444. The impairment-based definition more precisely effectuates Congress's explanation of the intended function of the "regarded as" prong in the ADA: If a person is disqualified from some opportunity "on the basis of an actual or perceived physical or mental condition" and the disqualifying entity cannot articulate a legitimate reason for taking the condition into account, then the person is covered by the ADA and the inquiry shifts to the issue of discriminatory animus, which can be inferred on these facts. H.R. REP. NO. 101-485, pt. 3, at 30-31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 453.

actual, recorded, or perceived impairment, or a lack of evidence indicating that their actions were based upon such an impairment. In addition, evidence of a legitimate business or other reason to take the impairment into account could similarly lead to summary dismissal.

Another criticism of the amendment is that it simply transfers the messy interpretive step from the "major life activity" and "substantially limits" elements to the "impairment" element and that courts will merely begin to use the "impairment" element as a new way to screen out legitimate cases at the summary judgment stage. This scenario is unlikely. In the vast majority of ADA cases, the impairment issue rarely surfaces as a point of contention,⁴⁴⁵ thanks perhaps to a fairly concrete regulatory definition,⁴⁴⁶ which clearly coincides with the intent evident in the legislative history.⁴⁴⁷ When the issue has surfaced, courts have had few problems applying the regulatory definition to a given set of facts.⁴⁴⁸ While a few specific conditions, such as addiction to nicotine⁴⁴⁹ or obesity,⁴⁵⁰ might test its

445. D'Agostino comments that "most cases involving challenges to the plaintiff's status as an individual with a disability under the ADA are not premised on the claim that the plaintiff's condition does not meet the most basic threshold of qualifying as an 'impairment' within the meaning of the implementing regulation." D'Agostino, *supra* note 172, at 2 (analyzing a compilation of 170 cases raising the issue of "disability" under the ADA).

446. See 29 C.F.R. § 1630.2(h) (1998). The regulations define physical or mental impairment as

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id.

447. See H.R. REP. NO. 101-485, pt. 2, at 51, *reprinted in* 1990 U.S.C.A.N. 303, 333 (articulating a definition of "physical or mental impairment" that is identical to the regulatory definition).

448. Asymptomatic HIV is one of the few conditions that has provoked prolonged judicial debate regarding the impairment element. See, e.g., *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 167-70 (4th Cir. 1997) (en banc) (holding that asymptomatic HIV is not a disability and noting the lack of guidance from committee reports and the Supreme Court as to the impairment element). However, after the Supreme Court's decision in *Bragdon v. Abbott*, 118 S. Ct. 2196, 2202-04 (1998), it seems that the inclusion of asymptomatic HIV as an impairment for ADA purposes is settled.

449. See Mark W. Pugsley, Note, *Nonsmoking Hiring Policies: Examining the Status of Smokers Under Title I of the Americans with Disabilities Act of 1990*, 43 DUKE L.J. 1089, 1104-05 (1994) (implying that addiction to nicotine would be an impairment under the ADA).

450. Compare *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997) ("[E]xcept in special cases where the obesity relates to a physiological disorder, [it] is not a 'physical

limits, the impairment definition contains much less room for manipulation than do the notions of "substantial limits" and "major life activities."

A final, more complex criticism concerns the interaction of the proposed disability definition and the duty to provide reasonable accommodation to persons with disabilities.⁴⁵¹ At present, the duty to accommodate arises when a covered entity knows that a person is disabled and may therefore need accommodation to perform effectively.⁴⁵² Therefore, one could charge that if the disability definition is expanded, the duty to provide accommodation is correspondingly, and perhaps overly, expanded. It is doubtful, however, that a change in the disability definition will have much practical effect on the duty to accommodate, as it is presently articulated. Accommodation is required only when it is necessary to provide an equal opportunity to a person with a disability; it is not intended to create a personal advantage.⁴⁵³ In addition, the duty to accommodate arises only when an impairment limits a person's opportunities to perform a job or to be eligible for benefits and privileges on an equal basis with non-disabled people.⁴⁵⁴ Finally, accommodation is required only when it is reasonable and does not impose undue hardship.⁴⁵⁵ These limitations on the duty to accommodate would remain in effect, no matter how disability is defined. Further, the recommended change to the ADA's disability definition will expand its coverage to include people with real, recorded, or perceived impairments that do not necessarily substantially limit major life activities. If the impairments do not limit such activities, then they will probably not limit the impaired individual's ability to perform job functions. To the extent that an

impairment' within the meaning of the [Rehabilitation Act and the ADA]."), with *Cook v. Rhode Island*, 10 F.3d 17, 23 (1st Cir. 1993) (holding that morbid obesity could be an impairment under the Rehabilitation Act). In general, an unattractive physical appearance, when not caused by a real or perceived physiological impairment, will not qualify as a disability for discrimination purposes. See 29 C.F.R. pt. 1630, app. § 1630.2(h) ("['Impairment' does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within 'normal' range and are not the result of a physiological disorder.>"). But see Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035-52 (1987) (arguing for the prohibition of discrimination based on physical appearance under the Rehabilitation Act of 1973).

451. Regarding the duty to accommodate, see *supra* notes 97-101 and accompanying text.

452. See 29 C.F.R. pt. 1630, app. § 1630.9.

453. See *id.*

454. See *id.*

455. See 42 U.S.C. § 12112(b)(5) (1994).

impairment imposes no barrier to performance, no accommodation would be required. Discrimination based on such a non-limiting impairment, however, would be prohibited under the recommended amendment to the disability definition.

V. CONCLUSION

The disability rights movement has in large part succeeded in encouraging Americans to rethink notions of ability and disability, and the ADA, with its novel requirement of reasonable accommodation, is evidence of that success. However, the specific language that the ADA uses to define "disability" has thus far prevented realization of the statutory goal of broadly prohibiting disability discrimination so as to allow people with disabilities to participate fully in society. By framing disability in terms of substantial limitations on major life activities, the ADA has wrongly focused on the nature of the victim of alleged discrimination rather than on the nature of the alleged discrimination itself. In doing so, it has encouraged courts to screen out many valid cases at the summary judgment stage.

When courts read the plain meaning of the disability definition in ways that contradict apparent congressional intent, it is not enough to encourage courts to change their interpretations. The statutory language itself must be changed. By amending the ADA's disability definition to eliminate notions of substantial limitations and major life activities, Congress could structure a new, impairment-based definition that would bring this aspect of the statute in line with the overall purposes of the ADA. Such a definition would lead to more equitable resolutions of disability discrimination claims because it would focus the inquiry in such cases on the motives of the defendant, rather than on the status of the plaintiff.

